

No. 07-6053

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In The  
**Supreme Court of the United States**

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DWAYNE GILES

*Petitioner,*

v.

STATE OF CALIFORNIA,

*Respondent.*

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**On Writ of Certiorari to the  
Supreme Court of California**

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**AMICUS CURIAE BRIEF OF THE BATTERED  
WOMEN'S JUSTICE PROJECT AND OTHER  
DOMESTIC VIOLENCE ORGANIZATIONS IN  
SUPPORT OF RESPONDENT**

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### INTEREST OF *AMICI CURIAE*<sup>1</sup>

The Battered Women's Justice Project ("BWJP") provides training and resources for advocates, battered women, legal and justice system personnel, policymakers, and others engaged in the justice system response to domestic violence. The BWJP promotes systemic change within community organizations and governmental agencies engaged in the civil and criminal justice response to domestic violence, in order to hold these institutions accountable for the safety and security of battered women and their children. The BWJP is an affiliated member of the Domestic Violence Resource Network, a group of national resource centers funded by the Department of Health and Human Services and other support since 1993. The BWJP also serves as a designated technical assistance provider for the Office on Violence Against Women of the United States Department of Justice. Many other domestic violence organizations, whose statements are appended hereto, share the BWJP's interest in the affirmance of the ruling below and join the BWJP as *amici curiae*.

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Counsel of record for all parties received notice of the intent to file at least 10 days prior to the due date of this brief. Letters reflecting such notice and consent have been filed herewith.

The resolution of the Question Presented will have a profound effect on the prosecution of domestic violence homicides. Due to the ongoing pattern of abuse invariably preceding such murders, and the inherently intimate nature of the relationship between the accused and the victim in domestic violence homicides, it is often the case that a victim's testimonial statements made prior to her killing will be the most probative evidence of the murderer's guilt. The BWJP and the other domestic violence organizations have a strong interest in preventing domestic murderers from silencing the voices of their victims by improper resort to the Confrontation Clause.

### **SUMMARY OF ARGUMENT**

Adding a specific intent requirement to the forfeiture by wrongdoing doctrine would be particularly improper in cases of domestic violence homicide. Domestic violence homicides occur within a history of violence, domination, and control. By its nature, a batterer's violent and coercive course of conduct carries with it an intent to silence his significant other. Indeed, domestic violence homicide is the ultimate act of silencing. A specific intent requirement would only further the batterer's campaign to silence his murdered victim's voice, trammeling on fundamental principles of equity.

The dynamics of domestic violence homicides compromise the truth-seeking function of the criminal adversary system, making the use of extrajudicial statements in such prosecutions

necessary to achieve the appropriate balance and allow the victim's voice to counter that of the batterer. Requiring a showing of specific intent would render many victims' statements inadmissible, and thus compel the inequitable result of allowing a batterer to control the content of the proceedings in a way that would further the domination and control he had exercised over his victim before he killed her.

A defendant forfeits his right to confront a witness against him at trial where his wrongdoing causes that witness to be unavailable for cross-examination—whether or not his specific intent at the time of the killing was to keep the victim from testifying against him. Thus, where a domestic violence homicide victim's testimonial evidence is otherwise admissible under state or federal rules of evidence, a murderer may not use the Confrontation Clause to silence his victim's voice. Rather, at the trial of her killer, under the forfeiture by wrongdoing doctrine, the Constitution allows a murder victim to speak from the grave by permitting a prosecutor to introduce evidence of relevant statements she made prior to her death. Narrowing the forfeiture by wrongdoing doctrine, by grafting onto it a "specific intent" requirement that would limit "wrongdoing" to intentional witness tampering, will make many domestic violence homicide prosecutions nearly impossible, leading to absurd and inequitable results that a balanced adversarial system cannot tolerate.

To require a showing of specific intent in order to apply the forfeiture by wrongdoing doctrine in domestic violence homicides would be inconsistent

with timeless principles of law and equity. Such principles counsel that the forfeiture by wrongdoing doctrine applies where a defendant's wrongdoing causes a result, the reasonably foreseeable consequence of which is the unavailability of the witness. Petitioner presents no historical authority or fair-minded argument against constructive forfeiture that would compel imposing a specific intent requirement upon the forfeiture by wrongdoing doctrine in cases of domestic violence homicide.

The decision of the California Supreme Court should be affirmed.

#### **ARGUMENT**

#### **THE FORFEITURE BY WRONGDOING DOCTRINE PROPERLY ALLOWS VICTIMS OF DOMESTIC VIOLENCE HOMICIDE TO SPEAK FROM THE GRAVE AND PROVIDE TESTIMONY AGAINST THEIR MURDERERS.**

The cramped interpretation of the forfeiture by wrongdoing doctrine advanced by Petitioner and his *amici* Defense Lawyers would lead to an absurd and inequitable result. The rule they advocate would exclude otherwise admissible evidence of guilt from a domestic homicide victim prior to her death at the hands of the accused, because the batterer is "deprived" of the ability to cross-examine her at trial. The Constitution compels no such result.

**I. PROPER APPLICATION OF THE FORFEITURE BY WRONGDOING DOCTRINE INCORPORATES AN UNDERSTANDING OF THE RELATIONAL CONTEXT AND DYNAMICS PRECEDING DOMESTIC VIOLENCE HOMICIDES.**

Domestic violence is a profound and debilitating social problem with far-reaching consequences.<sup>2</sup> Crimes of domestic violence account

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<sup>2</sup> *Amici* define domestic violence as the physical, sexual, psychological and/or emotional abuse and coercive control of a victim by her intimate partner, with the goal of asserting and maintaining power and control over the victim. *See, e.g.*, EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 5 (2007); Nichole Miras Mordini, Note, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295, 300 (2004); Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853 (1994). Although such violence does occur in same-sex relationships and can be committed by women, the vast majority of domestic violence victims are women and their attackers are men. *See, e.g.*, Callie Marie Rennison, Bureau of Justice Statistics, U.S. Dep't of Justice, *Crime Data Brief: Intimate Partner Violence, 1993-2001* 1 (NCJ 197838, Feb. 2003) (reporting that women are 85% of victims). Estimates of the number of American women assaulted and/or raped each year by an intimate partner range from 1.5 million to 4 million. *See* Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice & Ctrs. for Disease Control & Prevention, *Full Report of the Prevalence, Incidence and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* iv (NCJ 183781, Nov. 2000); *see also* AMERICAN PSYCHOLOGICAL ASS'N, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL

for a substantial portion of criminal justice caseloads, and, most significantly, of homicide cases.<sup>3</sup> Domestic violence homicides constitute nearly one out of every three homicides committed against women,<sup>4</sup> and this rate has been increasing over time.<sup>5</sup> It is crucial that legal policy thoughtfully address the true nature and effects of these crimes in the application of the Confrontation Clause to domestic homicides.

Domestic violence homicides occur within a context of violence, domination, and control. Batterers commit murder as final expressions of control and mastery over their intimate partners.<sup>6</sup>

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TASK FORCE ON VIOLENCE AND THE FAMILY 10 (1996). At least half of all women murdered in the United States are killed by an intimate partner. Violence Pol'y Center, *When Men Murder Women: An Analysis of 2003 Homicide Data* 3 (Sept. 2005) (92% of female victims murdered by someone they knew; 62% killed by husbands or intimate partners).

<sup>3</sup> See Violence Pol'y Center, *supra*, at 3. Nationally, an average of three women are murdered by their husbands or boyfriends every day. Sen. Joseph R. Biden, Jr., Subcomm. on Crime, Correction, and Victims' Rights, *10 Years of Extraordinary Progress: The Violence Against Women Act* 30 (2004).

<sup>4</sup> The FBI reports that in 2006, 32.2% of female homicide victims were murdered by a spouse or boyfriend. U.S. Dep't of Justice, Federal Bureau of Investigation, *Crime in the United States 2006: Expanded Homicide Data* (Sept. 2007).

<sup>5</sup> James Alan Fox & Marianna W. Zawitz, U.S. Dep't of Justice, Bureau of Justice Statistics, *Homicide Trends in the United States* (2007) (reporting a gradual increase of four percentage points since 1980).

<sup>6</sup> See NEIL WEBSDALE, UNDERSTANDING DOMESTIC HOMICIDE 207 (1999); see also STARK, *supra*, at 276-77.

Literally and figuratively, domestic homicide is the total silencing of a victim by her batterer. There is little doubt that most domestic homicide offenders intend to subjugate and silence their victims for all purposes through the act of murder.<sup>7</sup>

Batterers typically engage in ongoing patterns of both psychological and physical abuse, with the intent to exert power and control over victims in all aspects of their lives. As one leading study notes:

Despite the dramatic nature of physical assault, the single most important risk factor for gendered homicide is the level of entrapment established when physical domination through beatings and sexual assault (rape) is supported by intimidation, isolation, and control over money, food, sex, work, and access to family and friends.<sup>8</sup>

In nearly every case, domestic homicides are the final chapter in long histories of violence by the

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<sup>7</sup> See generally DAVID ADAMS, *WHY DO THEY KILL?* (2007). It also is worth noting that enormously popular public education campaigns employed by domestic violence programs throughout the United States are “Silent Witness” exhibits, which consist of life-size wooden cut-outs of domestic homicide victims, each bearing a written narrative documenting that victim’s specific experience with domestic abuse and murder. The campaigns are premised on the understanding that, all too often, victims’ experiences and stories are silenced by their batterers.

<sup>8</sup> EVAN STARK & ANNE FLITCRAFT, *WOMEN AT RISK: DOMESTIC VIOLENCE AND WOMEN’S HEALTH* 146 (1996).

abusers/murderers against their victims.<sup>9</sup> For this reason, the relationship between a domestic

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<sup>9</sup> See, e.g., ANN JONES, NEXT TIME, SHE'LL BE DEAD 87-96 (1994); CAL. WELF. & INST. CODE § 18290 (West 2005) (“[In many cases] acts of domestic violence lead to the death of one of the involved parties.”). Battered women’s advocates and scholars report that some history of violence is present in almost all domestic violence-related homicides. One study found that 86.6% of women killed by their intimate partners experienced violent victimization at the hands of their partners prior to their deaths. See WEBSDALE, *supra*, at 81-82. The researcher further notes, “As my analysis of the microdynamics of domestic homicide reveals, there is a clear relationship between everyday and life-threatening interpersonal violence on the one hand and domestic homicide on the other.” *Id.* at 204; see also ADAMS, *supra*, at 163 (reporting that of domestic murderers interviewed, “nearly all the killers had committed past physical and verbal assaults toward the women they murdered”). Another study reports that domestic abusers made prior threats to their homicide victims in at least 74% of cases. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Cases: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 7 (2003). This phenomenon has been routinely studied by state and local Domestic Violence Fatality Review Teams (FRTs). These multidisciplinary teams, which examine data known about parties prior to homicides, are usually government-sponsored and statutorily created. Various FRTs report that, at a minimum, anywhere between 45% and 67% of the fatalities reviewed included prior incidents of violence. See, e.g., Office of the Mayor’s Office to Combat Domestic Violence, *Annual Report of the New York City Domestic Violence Fatality Review Committee* (Dec. 2006) (reporting that 45% of studied parties’ families knew of prior incidents of domestic violence); San Diego County’s Health and Human Services Agency’s Office of Violence Prevention, *County of San Diego Domestic Violence Fatality Review Team 2004 Report* (2004) (reporting formally documented histories of domestic violence between the parties in 67% of the cases studied).

homicide and the history of abuse between the parties cannot be assessed as a series of discrete and disconnected episodes, but, rather, must be recognized as an ongoing continuum of violence.<sup>10</sup> The homicide is the culmination of a single, violent, and tragic story—not a discrete event lacking history. Indeed, “the single most important characteristic of woman battering is that the weight of multiple harms is borne by the same person, giving abuse a cumulative effect that is far greater than the mere sum of its parts.”<sup>11</sup>

The 1985 murder of Yolanda Silva at the hands of her boyfriend, Federico Gonzalez, illustrates this point perfectly.<sup>12</sup> Throughout their relationship, Gonzalez routinely beat Silva severely and often confined her to the bedroom.<sup>13</sup> Her injuries became so severe that she eventually was unable to work.<sup>14</sup> Two days before Silva’s death, a

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<sup>10</sup> WEBSDALE, *supra*, at 82. See generally Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959 (2004).

<sup>11</sup> STARK, *supra*, at 94.

<sup>12</sup> See *California v. Gonzalez*, No. D044037, 2005 Cal. App. Unpub. LEXIS 5065 (Cal. App. 4th June 10, 2005).

<sup>13</sup> *Id.* at \*5-6 (“[A witness] described a living situation where Silva was beaten by Gonzalez on a regular basis. Gonzalez would beat Silva in the bedroom they shared, and then forbid Silva to leave the bedroom . . . . During the beatings, Gonzalez would yell at Silva to hurry up and cook meals for him and to help [the witness] around the house. He would call Silva ‘whore’ and ‘slut.’”).

<sup>14</sup> *Id.*

witness described her as “all beaten up . . . . Her face was all bruised up. She couldn’t talk. She couldn’t walk. She was in a lot of pain, holding her stomach . . . .”<sup>15</sup> The witness knew Silva was hemorrhaging because blood was coming from her mouth and she vomited dark blood.<sup>16</sup> On the day Silva died, witnesses stated that Gonzalez had been beating Silva all day. They heard crying and screaming, and one witness looked into the bedroom and “saw blood on the walls” and “Gonzalez was leaning over Silva’s body; Silva was moaning and gasping for air.”<sup>17</sup> When the witness stopped hearing the moaning, she concluded Silva had died. A jogger later found Silva’s body “lying in debris in a rural area of Escondido.”<sup>18</sup>

The inseparability of a domestic homicide and a history of abuse challenges the conventional conceptions of crime as a single, isolated event.<sup>19</sup> This traditional concept of crime, which thoroughly pervades the criminal justice system, fails to account for the realities of battering, and has created enormous hurdles for the successful prosecution of domestic violence.<sup>20</sup> Overlooking the context and

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<sup>15</sup> *Id.* at \*6-7 (internal quotation marks omitted).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at \*7.

<sup>19</sup> BLACK’S LAW DICTIONARY (8th ed. 2004) (defining “crime” as “a positive or negative *act* in violation of penal law”) (emphasis added).

<sup>20</sup> *See generally* Mary Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective*

history surrounding these crimes too often has resulted in the system's inability to adequately protect victims of domestic violence. The realities of battering result in the silencing of the victim within the criminal justice system, a silencing then brought to completion by the victim's murder.

**II. A SPECIFIC INTENT REQUIREMENT WOULD UPSET THE BALANCE NEEDED FOR THE CRIMINAL JUSTICE SYSTEM TO FUNCTION IN A FAIR, EQUITABLE AND EFFECTIVE MANNER.**

A domestic homicide victim's statements of prior violence and threats by her batterer provide crucial evidence relating to her murder. Admission of such statements ensures a balanced application of justice in our criminal adversary system. To impose a specific intent requirement upon the forfeiture by wrongdoing doctrine would only serve to reward the most violent of batterers—those who kill.

**A. An Effective Criminal Justice System Requires the Use of Extrajudicial Statements in Domestic Violence Homicide Prosecutions.**

The realities of battering and domestic violence homicides have forced prosecutors to be resourceful in identifying and obtaining a variety of evidence to prove the guilt of a murderer.

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*Prosecution Strategies From Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 1 (1991).

Recognizing the unique characteristics presented by domestic violence homicides, prosecutors have developed “evidence-based” prosecution. Evidence-based prosecution emphasizes the gathering of reliable evidence, such as 911 tapes, photographs, medical records, admissions by a defendant, statements of relatives or neighbors, and police observations, in order to build a case that does not depend upon the participation of the victim. Utilizing long-accepted exceptions for excited utterances, medical treatment statements, and present sense impressions, prosecutors attempt to hold batterers accountable for their criminal conduct, even in the absence of the victim. It is neither possible nor safe to require victims to testify at trial in every domestic violence case, and, of course, impossible in a homicide case. Evidence-based prosecution is the most effective means of furthering the compelling public interest in bringing violent abusers to justice, while ensuring that victims are protected as much as possible.<sup>21</sup>

The prosecution of a domestic violence homicide is far different from the prosecution of other homicides.<sup>22</sup> In a domestic violence homicide,

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<sup>21</sup> Casey G. Gwinn & Sgt. Anne O’Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297, 311 (1993); Deborah Epstein, *Procedural Justice: Tempering the State’s Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1858 (Apr. 2002); Corsilles, *supra*, at 877-78.

<sup>22</sup> Prosecutors recognize the difficulty in prosecuting domestic violence as compared to other crimes. Many prosecutors’ offices have divisions dedicated solely to the prosecution of domestic violence, *e.g.*, Colorado Springs DVERT

the defendant and the victim necessarily knew each other on an intimate level. They shared a complicated and *private* history, permeated by a pattern of escalating violence perpetrated by the batterer/defendant.<sup>23</sup> When the batterer's violence escalates to killing the victim, the relationship between the defendant and the victim necessarily plays a key role in both the prosecution and the defense of the case.<sup>24</sup> For the prosecution, the relationship is crucial to presenting its case-in-chief, as it relates to issues of motive and intent.<sup>25</sup> For the defense, in many domestic violence homicide cases

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project; Brooklyn District Attorney's Office Family Violence Center; San Diego City Attorney's Office Domestic Violence Unit. State and local judiciaries acknowledge the challenges in such prosecutions by hearing domestic violence cases in dedicated domestic violence courts. The prosecutors, judges, and court staff receive specialized training to enable them to best handle the complexities present in domestic violence cases.

<sup>23</sup> See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1204 (2003); WEBSDALE, *supra*, at 204.

<sup>24</sup> See, e.g., *United States v. Mayhew*, 380 F. Supp. 2d 961, 965-68 (S.D. Ohio 2005) (statements made by dying witness (defendant's daughter) not admitted under "dying declaration" rule, only allowed under forfeiture by wrongdoing application); *Minnesota v. Crowsbreast*, 629 N.W.2d 433 (Minn. 2001) (court admitted prior statements of victim to demonstrate a pattern of domestic abuse for heightened first degree domestic abuse murder charge).

<sup>25</sup> See, e.g., *California v. Romero*, 149 Cal. App. 4th 29, 40 (Cal. Ct. App. 2007) (court admitted statement by witness that deceased had told witness that Romero had threatened to kill him if Romero ever found him with someone else).

(including this case), the defendant chooses to present evidence of the relationship in an attempt to limit or avoid liability.<sup>26</sup> While he admits that his actions caused the death of the victim, the defendant introduces evidence to prove that his actions somehow were justified (*e.g.*, self-defense)<sup>27</sup> or lacked the requisite *mens rea*.<sup>28</sup> In these and other cases, the effective prosecution of domestic violence homicide requires that prosecutors be able to conduct evidence-based prosecutions and make use of victims' extrajudicial statements.

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<sup>26</sup> *See, e.g., United States v. Garcia-Meza*, 403 F.3d 364, 368 (6th Cir. 2005) (defendant admitted to responsibility of wife's death, but claimed he was not guilty of first degree murder).

<sup>27</sup> *See, e.g., Romero*, 149 Cal. App. 4th at 37 (statements of witness admitted to rebut claim of self-defense).

<sup>28</sup> *See, e.g., Michigan v. Bauder*, 712 N.W.2d 506, 517 (Mich. Ct. App. 2005) (defendant used a baseball bat to sexually assault and murder his girlfriend by bashing her head in; at trial, defendant claimed no premeditation; trial court permitted statements of victim describing boyfriend's prior violence and threats under theory that defendant had forfeited his right to confrontation); *Montana v. Sanchez*, No. DA 06-0052, 2008 Mont. LEXIS 27, at \*3-4 (Mont. Jan. 31, 2007) (letter by victim detailing fear of murder by defendant admitted under forfeiture by wrongdoing doctrine to rebut defendant's claim of acting in the heat of passion).

**B. The Admission and Consideration of Extrajudicial Statements in Domestic Homicide Prosecutions Preserves Balance in the Adversarial System.**

Silencing a homicide victim's statements about her relationship with the defendant subverts the adversarial system by allowing the defendant to present a one-sided and un-checked version of the relationship. To protect the truth-seeking function of the adversarial process, fact-finders should have access to relevant evidence that, but for the defendant's conduct, would have been available through live testimony.

In domestic violence murder prosecutions, a victim's prior statements of abuse are vital evidence, as they often are the only proof of those previous violent acts. Such statements thus are not only highly probative, but indeed are necessary to permit the State a reasonable opportunity to prove its case, by helping to demonstrate intent, motive, or identity, as well as to refute claims of self-defense or accident.<sup>29</sup> Such statements permit the fact-finder to assess a balanced picture of the relationship and of the murder.<sup>30</sup> Were it otherwise, a fact-finder would be left to consider solely the batterer/defendant's

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<sup>29</sup> See, e.g., *Taylor v. State*, 855 So. 2d 1, 18-19 (Fla. 2003) (victim's state of mind relevant if defendant claims self-defense, that victim committed suicide, or that death was accidental).

<sup>30</sup> See Statement of Cheryl Hanna, Professor of Law, Vermont Law School (Mar. 11, 2008), appended hereto at A-10.

self-serving depiction of events.<sup>31</sup> Exclusion of a victim's extrajudicial statements would serve to dramatically tilt domestic violence murder prosecutions in favor of *untruth*—that proffered (unchallenged) by the batterer/defendant.

A victim's extrajudicial statements describing prior violent acts and threats demonstrate the connection between domestic violence and domestic homicide. These statements illuminate the nature of the violence and the relationship for the fact-finder and provide valuable evidence that helps satisfy the State's high burden, ensuring that the reality of the crime is truthfully and fairly presented.

The facts of the case before the Court illustrate the potential for the subversion and manipulation of the truth where a defendant is allowed to present a one-sided, unchallenged version of events. In this case, there were no eyewitnesses to the fatal shooting; Petitioner and the victim were the only ones present.<sup>32</sup> The Petitioner chose to testify at trial, admitting that he had shot the victim six times, but claiming that he acted merely in self-defense.<sup>33</sup> In relating his version of the fatal events, the Petitioner repeated statements allegedly made

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<sup>31</sup> See Tuerkheimer, *supra*, at 1022.

<sup>32</sup> *California v. Giles*, 152 P.3d 433, 443 (Cal. 2007).

<sup>33</sup> *Id.* Petitioner's claims at trial included: 1) Avie was very jealous of other women; 2) Avie was violent person, had previously shot a man, threatened others with knives; 3) Avie had vandalized his home and car.

by the victim.<sup>34</sup> Thus, partially through the victim's own alleged statements, Petitioner portrayed her as an aggressive, foul-mouthed, jealous, and volatile person.<sup>35</sup>

Such a one-sided presentation of events is contrary to the fundamental fairness of our adversarial system, which the Sixth Amendment is designed to protect. Our adversarial system is “premised on the well-tested principle that truth—as well as fairness—is ‘best discovered by powerful statements on *both* sides of the question.’”<sup>36</sup> In *Crawford*, the Court noted that “adversarial testing ‘beats and bolts out the Truth much better.’”<sup>37</sup> It is this aspiration to fully develop all the relevant facts at trial that is fundamental to the balanced and equitable workings of our criminal justice system.<sup>38</sup>

The limited construction of the forfeiture by wrongdoing doctrine advocated by the Petitioner would undermine the integrity of this adversarial process. The prosecution would be limited in its ability to test a defendant's (and other witnesses')

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<sup>34</sup> *Id.* at 444. Petitioner's claims included: 1) Avie knew his new girlfriend was present; 2) Avie claimed she was on her way to kill him and “that bitch;” and 3) Avie charged at him.

<sup>35</sup> *Id.*

<sup>36</sup> *Person v. Ohio*, 488 U.S. 75, 84 (1988) (emphasis added and citation omitted).

<sup>37</sup> *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (quoting M. HALE, HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (1713)).

<sup>38</sup> *Accord United States v. Nixon*, 418 U.S. 603, 709 (1974).

testimony, while the defense could present evidence of the relationship and statements of the victim that would go unchallenged. Thus, the defendant's ability to control how the relationship is depicted in the courtroom mirrors his control of the relationship, and of the victim, prior to her murder. The result would be an abundance of false negatives. By drowning out the ability of victims to speak from the grave, a specific intent requirement would have the ill effect of ultimately rewarding batterers who commit the most heinous violence against their victims.<sup>39</sup>

A number of other recent domestic violence homicide cases decided in the wake of *Crawford* and *Davis* vividly illustrate the necessity of introducing evidence of extrajudicial statements as a means of giving voice to the murder victims. The homicide case of Julie Jensen is particularly instructive. On December 3, 1998, 40-year-old mother of two Julie Jensen was "discovered" dead in her bed by her husband Mark. Initially, police suspected suicide as the likely cause of death.<sup>40</sup> Like so many other victims of domestic violence homicide, Julie Jensen had feared that her husband was going to kill her. She reported her suspicions to the police before she died, but Mark was never questioned.<sup>41</sup> So she did something else. Before her death, Julie gave a sealed

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<sup>39</sup> See Statement of Paul Dedinsky, Asst. District Attorney, Milwaukee County District Attorney's Office (Mar. 17, 2008), appended hereto at A-12.

<sup>40</sup> Jay Schadler & Susan B. Miller, *Death Foretold*, 20/20 (ABC television broadcast Feb. 29, 2008), available at <http://abcnews.go.com/2020/Story?id=4359389&page=2>.

<sup>41</sup> *Id.*

envelope to her neighbors, telling them that “if anything happens, give it to the police.”<sup>42</sup> After her death, the neighbors did provide the envelope to the police.<sup>43</sup> Inside the envelope was a photograph and a letter written by Julie, saying:

I am suspicious of Mark’s suspicious behaviors and fear for my early demise. . . . If anything happens to me, he would be my first suspect. I would never take my life because of my kids—they are everything to me!<sup>44</sup>

The photograph depicted a shopping list, written by her husband Mark, containing items such as poisons and syringes.<sup>45</sup> Julie’s trusted neighbor’s reaction said it best: “I don’t think you need anything else. Just read this and you know what happened.”<sup>46</sup>

However, in 2002, the letter was ruled inadmissible under the Confrontation Clause, silencing Julie once again and thwarting the prosecution’s efforts to bring her husband to justice. That ruling was appealed to the Wisconsin Supreme Court, which reversed and remanded:

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> The text of the letter is appended hereto at A-13. An actual copy of the note is available at [http://abcnews.go.com/images/2020/ht\\_julie\\_letter\\_080228.pdf](http://abcnews.go.com/images/2020/ht_julie_letter_080228.pdf).

<sup>45</sup> Schadler & Miller, *supra*.

<sup>46</sup> *Id.*

[W]e reverse the circuit court's decision as to the applicability of the forfeiture by wrongdoing doctrine. Today, we explicitly adopt this doctrine whereby a defendant is deemed to have lost the right to object on confrontation grounds to the admissibility of out-of-court statements of a declarant whose unavailability the defendant has caused.<sup>47</sup>

The question sent back to the trial court was not one of specific intent. Instead, the simple and equitable question was whether Jensen caused Julie's unavailability to testify. In 2007, Julie Jensen's letter was ultimately ruled admissible.<sup>48</sup> In January 2008, her husband was found guilty of poisoning her by injecting her with antifreeze and then suffocating her, and was sentenced to life in prison.<sup>49</sup> But for the decision of the Wisconsin Supreme Court allowing Julie to speak from the grave, Mark Jensen might have gotten away with murder.

Other examples abound. In *Montana v. Sanchez*,<sup>50</sup> Raul Sanchez fatally shot his girlfriend, Aleasha Chenowith, outside her home. Holding that the defendant forfeited his right to confrontation by reason of his crime, the court affirmed the trial

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<sup>47</sup> *Wisconsin v. Jensen*, 727 N.W. 2d 518, 521 (Wis. 2007).

<sup>48</sup> Schadler & Miller, *supra*.

<sup>49</sup> *Id.*

<sup>50</sup> No. DA 06-0052, 2008 Mont. LEXIS 27 (Mont. Jan. 31, 2008).

judge's decision to allow the prosecution to introduce a crucial piece of evidence: a note written by the victim, portending her murder at the hands of the defendant.<sup>51</sup> Had the Court limited the forfeiture by wrongdoing doctrine in the fashion Petitioner urges, the victim's note would not have been admitted, and the jury would not have learned of the defendant's prior domestic violence history that caused the victim to fear for her life.

In *Colorado v. Moore*,<sup>52</sup> the defendant, weighing 300 pounds, sat on his wife causing her excruciatingly slow death by asphyxiation. If the *Moore* court had excluded the prior evidence of domestic violence, including one incident where defendant had repeatedly pounded the victim's head against the side of their trailer and a second incident where the defendant had stabbed the victim, the defendant would have been unjustly rewarded for succeeding in killing his wife in such a gruesome fashion. Fortunately, the Court held that under the forfeiture by wrongdoing doctrine, "a defendant is not to benefit from his or her wrongful prevention of future testimony from a witness, regardless whether that witness is the victim in the case."<sup>53</sup> Citing *Crawford* and the equitable rationale for the rule of forfeiture by wrongdoing, the *Moore* court explained:

Here, there is no dispute that the victim was unavailable to testify

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<sup>51</sup> *Id.* at \*34-35.

<sup>52</sup> 117 P.3d 1 (Colo. Ct. App. 2004).

<sup>53</sup> *Id.* at 5 (citing *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999)).

because of her death and that her death was the result of defendant's actions. Therefore, we conclude that defendant forfeited his right to claim a confrontation violation in connection with the admission of the victim's statements into evidence.<sup>54</sup>

The court did not require a showing that the defendant's actions were motivated by any specific intent to prevent the victim from testifying at trial.<sup>55</sup>

The same can be said of *United States v. Garcia-Meza*,<sup>56</sup> where the Sixth Circuit recognized that equitable principles counsel that no specific intent requirement be added to the forfeiture by wrongdoing doctrine.<sup>57</sup> The Sixth Circuit held that the defendant's Sixth Amendment rights were not violated when the trial court allowed the jury to hear

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<sup>54</sup> *Moore*, 117 P. 3d at 5.

<sup>55</sup> *Id.*; see also *Kansas v. Meeks*, 88 P.3d 789 (Kan. 2004).

<sup>56</sup> 403 F.3d 364 (6th Cir. 2005).

<sup>57</sup> *Id.* at 369 (“Though the Federal Rules of Evidence may contain [the intent to silence] requirement, the right secured by the Sixth Amendment does not . . . .”) (citations omitted); see also *Gonzalez v. Texas*, 155 S.W.3d 603, 611 (Tex. App. 2004) (observing that “we see no reason why the [forfeiture] doctrine should be limited to such cases”); *California v. Ruiz*, No. H26609, 2005 Cal. App. Unpub. LEXIS 6296, at \*18-19 (Cal. Ct. App. July 19, 2005) (holding that “if the forfeiture rule is to further the maxim that no one shall be permitted to take advantage of his own wrong, then the motivation for the wrongdoing must be deemed irrelevant”) (internal quotation marks and citation omitted).

testimony from police officers describing the wife's statements about a prior assault.<sup>58</sup> The facts in *Garcia-Meza* almost mirror those in the case at hand.<sup>59</sup> Defendant had forfeited his right to confrontation because his wrongdoing unquestionably caused the victim's unavailability,<sup>60</sup> making a showing of "specific intent" was unwarranted:

The Defendant, regardless of whether he intended to prevent the witness from testifying against him or not, would benefit through his own wrongdoing if such a witness's statement could not be used against him, which the rule of forfeiture, based on principles of equity, does not permit.<sup>61</sup>

As these examples demonstrate, a victim's past statements provide crucial evidence of the very events that brought about her demise and cannot be ignored. Such statements represent the final voice

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<sup>58</sup> *Garcia-Meza*, 403 F.3d at 369.

<sup>59</sup> *Id.* *Garcia-Meza* was charged with the murder of his wife, Kathleen. Five months before her killing, *Garcia-Meza* assaulted Kathleen. In the murder trial, the district court admitted testimony from the responding police officers about the prior incident. At trial, the defendant admitted killing his wife, but claimed his actions were not premeditated. After his conviction, *Garcia-Meza* appealed, claiming his constitutional confrontation rights were violated by admission of his wife's prior statements.

<sup>60</sup> *Id.* at 370 (citing *Crawford*, 541 U.S. at 62; *Reynolds v. United States*, 98 U.S. 145, 158-59 (1879)).

<sup>61</sup> *Id.* at 370-71.

of these homicide victims. Requiring a showing of specific intent would create a logical absurdity where the wrongful actions of the batterer subvert and bury the truth. Domestic murder defendants could hide behind the Sixth Amendment and actually be rewarded for their criminal behavior. Not only would the domestic violence victim be buried by the violent actions of the batterer, so would her rightful ability to speak from the grave.

**III. REQUIRING A SHOWING OF SPECIFIC INTENT IN ORDER TO APPLY THE FORFEITURE BY WRONGDOING DOCTRINE IN DOMESTIC VIOLENCE HOMICIDES IS INCONSISTENT WITH TIMELESS PRINCIPLES OF LAW AND EQUITY.**

Fundamental notions of what is wrong and what is equitable that were as true at the Founding as they are now make plain that the Confrontation Clause provides no refuge for the murderer who would seek to silence his victim's voice in court. From time immemorial, it has been the case that murder is wrongdoing and that equity confers no benefit on wrongdoers. The interpretation of the Confrontation Clause that Petitioner and the Defense Lawyers urge would allow a murdering batterer to benefit from his crime, an absurd result that the Founders could not have contemplated.

**A. Timeless Principles Do Not Allow a Murderer to Benefit from His Crime.**

The law before, during, and after the time of the Founding recognized that murder is wrongful. No less authority than the Ten Commandments, the very “foundation of the rule of law,”<sup>62</sup> tell us so: “Thou shalt not kill.”<sup>63</sup> Murder, this Court thus has recognized, is *malum in se*.<sup>64</sup>

Timeless principles of equity that have informed this Court’s interpretation of the Confrontation Clause counsel that the forfeiture by wrongdoing doctrine applies where a defendant’s wrongdoing causes a result, the reasonably foreseeable consequence of which is the unavailability of the witness. In such a case, the defendant has constructively forfeited his right to confrontation.<sup>65</sup> Where it is the defendant’s own

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<sup>62</sup> *McCreary County v. ACLU*, 545 U.S. 844, 906-07 (2005) (Scalia, J., dissenting).

<sup>63</sup> EXODUS 20:13 (King James Version), in AMERICAN BIBLE SOCIETY, THE HOLY BIBLE AS PRINTED BY ROBERT AITKEN & APPROVED & RECOMMENDED BY THE CONGRESS OF THE UNITED STATES OF AMERICA IN 1782 (1968). The Aitken Bible has been referred to as the “Bible of the Revolution.” It was the very first English-language Bible published in America, as noted in the Foreword and Preface to the 1968 reprinting. See also Library of Congress, *Religion and the Founding of the American Republic* (2003), at <http://www.loc.gov/exhibits/religion/rel04.html>.

<sup>64</sup> *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 485-87 (1869).

<sup>65</sup> Another right established in the Sixth Amendment, the right to be present at trial, is subject to constructive

wrongdoing that foreseeably causes his inability to cross-examine his victim, the forfeiture by wrongdoing doctrine mandates that this inability does not violate the defendant's rights under the Confrontation Clause.<sup>66</sup>

Murder is the easy case; it presents the most compelling example of forfeiture by wrongdoing. To murder someone is to prevent her from doing anything—ever. That, of course, includes testifying at trial against her killer as a live witness. Having killed the victim, “there is no doubt that the Defendant is responsible for [her] unavailability,”<sup>67</sup> a reasonably foreseeable result at the time the defendant committed the crime. Where a victim's extrajudicial statements are otherwise admissible, equity does not allow the killer to silence his victim once more, but, rather, demands that the murder

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forfeiture where a defendant engages in wrongful disruptive conduct. *Illinois v. Allen*, 397 U.S. 337, 338 (1970). No showing of “specific intent” to be removed from court is required before a court removes a defendant from the courtroom—the defendant need only engage in conduct sufficiently disruptive to the proceedings. Surely if the right to be present, “[o]ne of the most basic of the rights guaranteed by the Confrontation Clause,” *id.* at 348, can be forfeited by objectively wrongful conduct, the right to confront, which possesses no such weight, *Whorton v. Bockting*, 127 S. Ct. 1173, 1182-83 (2007), can be constructively forfeited (*i.e.*, forfeited without any specific intent), as well.

<sup>66</sup> Lower courts acknowledge constructive forfeiture of the right to confrontation. *See, e.g., Clark v. Perez*, 510 F.3d 382, 395-96 (2d Cir. 2008); *United States v. Miller*, 116 F.3d 641, 667 (2d Cir. 1997).

<sup>67</sup> *Garcia-Meza*, 403 F.3d at 370.

victim be able to testify against her killer from the grave.

State court application of the forfeiture by wrongdoing doctrine in domestic murder cases counsels against adding any specific intent requirement. State courts of general jurisdiction are where murder cases are tried, and, in the wake of *Crawford* and *Davis*, an emerging majority of State cases have declined to require “specific intent.”<sup>68</sup> The weight of this authority should not be taken lightly. While the Framers surely understood that murder was wrongful in any sense of the word, they just as surely understood that most, if not all, murder cases would be within the general jurisdiction of State courts, not within the limited jurisdiction of Federal courts. Thus, the interpretation of the forfeiture by wrongdoing doctrine and its application by the States to domestic violence homicide prosecutions warrants respect.<sup>69</sup>

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<sup>68</sup> See, e.g., *Sanchez*, 2008 Mont. LEXIS 27, at \*34; *Gonzalez*, 195 S.W.3d at 124; *Colorado v. Vasquez*, 155 P.3d 565, 568 (Colo. Ct. App. 2006); *Massachusetts v. Edwards*, 830 N.E.2d 158, 165 (Mass. 2005); *Bauder*, 712 N.W.2d at 513.

<sup>69</sup> Accord *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989).

**B. There Is No Historical Authority or Fair-Minded Argument that Compels Adding a Specific Intent Requirement to the Forfeiture by Wrongdoing Doctrine.**

Petitioner and his *amici* Defense Lawyers fail to confront the blatant inequities that their interpretation would produce. While their briefs are long on citations to the inapposite and the ambiguous, they are remarkably short on, and indeed avoid, any meaningful discussion of the absurd implications that their tortured interpretation of the Constitution would yield. Petitioner and the Defense Lawyers fail to confront the wrongfulness of murder in light of the equitable nature of the forfeiture doctrine. Rather than confront the inequities they would have the Court (and the Framers) impose, the Defense Lawyers, like Petitioner, draw the improbable conclusion from their survey of inapt cases that their interpretation is “simply the rule of law” of the “Confrontation Clause as it was written and originally understood.”<sup>70</sup>

To the contrary, neither the very best “authority” to which Petitioner and the Defense Lawyers can point, nor their proffered explanation as to why that authority does not include any on-point cases, can justify grafting any specific intent requirement onto the forfeiture by wrongdoing doctrine. Simply put, there is no authority that supports Petitioner’s theory that would compel the

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<sup>70</sup> NACDL Br. at 25.

absurd and inequitable result he seeks.<sup>71</sup> Petitioner and the Defense Lawyers simply do not acknowledge constructive forfeiture. Without any authority that directly supports their vision of the common law, Petitioner and the Defense Lawyers are left to cherry-pick language from cases and treatises over the centuries, offering the Court snippets of text that, on balance, are at best ambiguous. Nearly all the proffered language from the old cases, treatises, and dictionaries they cite can be plausibly read to contemplate forfeiture without any requirement of specific intent.<sup>72</sup> Their arguments thus amount to nothing more than the “[f]ine parsing of somewhat

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<sup>71</sup> *Amici* Defense Lawyers try to explain their failure to find truly supportive authority by arguing that “no lawyer [before or at the time of the Founding] ever suggested admitting [a murder victim’s] excluded statements on forfeiture grounds is powerful evidence that the rule did not extend so far.” NACDL Br. at 16. It is just as plausible, however, that there are no reported cases excluding such evidence because murder victims’ pre-murder statements were routinely admitted, without objection. It may well be that defense lawyers did not raise confrontation objections in this situation because, as in the matter currently before the Court, it was obvious from the facts that the murder victim was made unavailable by defendant’s conduct, which was plainly wrongful in any sense of the word.

<sup>72</sup> For instance, Petitioner makes much of the verb “procure” as connoting specific intent, but glosses over the fact that the “leading dictionary of the early republic,” which he quotes, defines “procure” only as meaning to “cause” or “bring about.” Pet. Br. at 27. Perhaps even more compelling is the definition taken from the Oxford English Dictionary, which defines “procure” as meaning, among other things, “to endeavor to cause or bring about (mostly something evil) to or for a person.” *Id.*

arcane precedents, over which reasonable judges may disagree.”<sup>73</sup>

\* \* \* \*

Adhering to a narrow forfeiture by wrongdoing doctrine that requires a defendant’s specific intent to keep a witness from testifying in a future proceeding not only drowns out the ability of domestic homicide victims to speak from the grave, but also rewards batterers who commit the most heinous violence against their victims. Domestic violence homicide is the ultimate act of silencing. A specific intent requirement would only further the batterer’s campaign to silence his murdered victim’s voice, trammeling on principles of equity. Imposing a specific intent requirement would act to encourage the most violent criminal behavior, inviting batterers to fatally confront their victims outside the courtroom, so that they might avoid confronting them at trial. The Constitution compels no such result.

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<sup>73</sup> *Danforth v. Minnesota*, 128 S. Ct. 1029, 1058 (2008) (Roberts, C.J., dissenting).

**CONCLUSION**

For the foregoing reasons, the judgment of the California Supreme Court should be affirmed.

Respectfully Submitted,

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## APPENDIX

### Statements of Interested Domestic Violence Organizations

**Arizona Coalition Against Domestic Violence.** *Amicus* Arizona Coalition Against Domestic Violence (“AzCADV”) is a non-profit organization comprised of representatives from domestic violence programs and other concerned individuals and groups. This statewide organization strives to increase public awareness about the issue of domestic violence, enhance the safety of, and services available to, domestic violence victims, and reduce the incidents of domestic violence in Arizona families. AzCADV’s heavy involvement in combating domestic violence includes monitoring courts, sponsoring legislation, and lobbying in support of (or against) bills that will impact victims and hold perpetrators accountable. AzCADV delivers training and presentations on numerous domestic violence topics across Arizona. In addition, AzCADV operates the state’s only legal advocacy hotline for victims, friends, family, and concerned citizens to access support, information, and referrals. AzCADV strongly believes that the key to ending domestic violence is holding perpetrators accountable for their crimes. The organization dedicates itself to making changes in the justice system to ensure that victims are treated with dignity and respect and that abusers are punished appropriately.

**End Violence Against Women International.** *Amicus* End Violence Against

Women International (“EVAW International”) was founded in January 2003 to accomplish the goal of educating the general public and public safety workers about the crimes of sexual assault and domestic violence. The organization provides effective, victim centered, multi-disciplinary training, and expert consultation regarding crimes of sexual assault and domestic violence. EVAW International also seeks to identify and disseminate effective primary prevention programs for men, as well as risk reduction programs for women. The primary activity of EVAW International is to provide training, through international conferences, regional training seminars, and an internet-based training curriculum. Each training opportunity focuses on educating community professionals, especially police officers, prosecutors, forensic examiners, victim advocates, other first responders, and community stakeholders, about violence against women and the effective investigation and response to these crimes. The mission of EVAW International centers on improving the criminal justice and community response to crimes of sexual assault, domestic violence, and stalking. Achieving this goal requires implementing reforms that are based on a realistic understanding of the dynamics of these crimes. Otherwise, offenders thwart the process, avoid accountability, and re-traumatize their victims.

**Georgia Coalition Against Domestic Violence.** *Amicus* Georgia Coalition Against Domestic Violence (“GCADV”) is a non-profit organization comprised of a network of domestic violence programs in Georgia. Eliminating violence

against women by promoting system change and intervention programs for battered women is the goal of GCADV. The organization provides technical assistance and training on domestic violence to lawyers, judges, law enforcement, probation officers, batterer intervention programs and advocates. GCADV works with other partners throughout Georgia in developing policy, and working to strengthen systems' response to domestic violence. GCADV is deeply committed to achieving a criminal justice response to domestic violence that provides meaningful protection to victims. A strong criminal justice system both deters individuals from committing acts of domestic violence, and strongly influences communities' intolerance toward domestic violence.

**Hawaii State Coalition Against Domestic Violence.** *Amicus* Hawaii State Coalition Against Domestic Violence ("HSCADV") is a private, not-for-profit organization. As a statewide coalition of domestic violence programs, HSCADV ensures the safety and protection of women in intimate relationships by coordinating domestic violence prevention and intervention services in Hawaii. HSCADV provides education and training on family violence, collects resource materials, serves as a clearinghouse, provides technical assistance on family violence matters, and provides facilitation when requested by member agencies. Domestic violence's recent impact on Hawaii is great. In 2007, six women lost their lives as a result of domestic violence, followed by two more domestic violence related murders in early 2008. These women, their

surviving children, family and friends deserve justice.

**Jane Doe Inc., The Massachusetts Coalition Against Sexual Assault and Domestic Violence.**

*Amicus* Jane Doe Inc., The Massachusetts Coalition Against Sexual Assault and Domestic Violence (“JDI”) is a statewide membership organization of more than sixty community-based sexual assault and domestic violence programs in Massachusetts. JDI brings together organizations and people committed to ending sexual assault and domestic violence. JDI works to transform social norms that are the root causes of this violence and promote safety, justice and healing for survivors. JDI advocates for responsive public policy, raises awareness, promotes collaboration and supports its member organizations to provide comprehensive prevention and intervention services. JDI is deeply committed to advancing and supporting practices, policies and systems that are responsive and promote both liberty and safety for victims of sexual and domestic violence and their children.

**Kentucky Domestic Violence Association.**

*Amicus* Kentucky Domestic Violence Association (“KDVA”) is a nonprofit organization founded in 1981 and incorporated in the State of Kentucky. The organization serves as an advocate for safety and justice for battered women and their children, and provides comprehensive services to families through fifteen shelter programs located across the state. KDVA offers training, technical assistance, and consultation on all aspects of domestic violence

advocacy in both the criminal and civil justice systems. The organization's staff provides resources and information on effective prosecution of domestic violence offenders, as well as protection orders, confidentiality issues, divorce and custody, and separation violence.

**Minnesota Coalition for Battered Women, Inc.** *Amicus* Minnesota Coalition for Battered Women, Inc. ("MCBW") is a private, non-profit membership organization in Minnesota which serves as a statewide coalition of local, regional and statewide grassroots organizations which provide shelter and services to battered women and their families. MCBW has over ninety member programs located throughout all regions of the state. MCBW provides training and technical assistance for member programs, networking and support for battered women and community education to law enforcement, schools and the general public. The member organizations of MCBW, with consultation and assistance provided by MCBW, provide shelter and law advocacy every year to thousands of battered women. MCBW, both directly and in collaboration with member programs, works with law enforcement and prosecutors to provide safety for battered women and their children.

**National Coalition Against Domestic Violence.** *Amicus* National Coalition Against Domestic Violence ("NCADV") was formed in 1978 to provide a national network of programs serving victims of domestic violence. NCADV now has over 2,000 programs currently in the United States.

NCADV provides technical assistance, general information and referrals, community awareness campaigns, and does public policy work at the national level. NCADV has participated in many *amicus* briefs over the years on issues related to victims of domestic violence.

**Nevada Network Against Domestic Violence.** *Amicus* Nevada Network Against Domestic Violence (“NNADV”) was founded in 1980 to work toward the elimination of domestic and sexual violence against all persons. NNADV works closely with advocates, judges, legislators, law enforcement officers, and prosecutors in advancing more effective criminal justice system responses to victims and domestic violence offenders. NNADV’s member programs share the goal of ending domestic violence through coordinated community response efforts, community education, public policy development, and services for victims. NNADV strongly believes that fairness and justice in domestic violence cases rests on the unwavering principle that domestic violence is a crime for which offenders must be prosecuted and held accountable, and the victims provided meaningful protection. Across the state, communities strive to enforce Nevada’s domestic violence laws and provide safety for victims of such violence.

**New Mexico Coalition Against Domestic Violence.** *Amicus* New Mexico Coalition Against Domestic Violence (“NMCADV”) is a not-for-profit organization incorporated in the state of New Mexico. Founded in 1981, its mission, along with the

ultimate vision of social justice, is ending violence against women through partnerships, advocacy, and direct services. NMCADV also plays an instrumental role in advocating for laws and policies, locally and nationally, that affect battered women and their children.

**Oklahoma Coalition Against Domestic Violence & Sexual Assault.** *Amicus* Oklahoma Coalition Against Domestic Violence & Sexual Assault (“OCADVSA”) is the professional membership organization of Oklahoma based domestic violence and sexual assault victim service providers. Since 1981, the OCADVSA has represented the critical needs of survivors of domestic violence, sexual assault, stalking, and dating violence throughout the state. The organization provides training to professionals, technical assistance to service providers, advocates for legislative change, and promotes public awareness. OCADVSA develops and maintains the state domestic and sexual violence data collection system, houses a comprehensive clearinghouse and library, maintains a domestic violence and sexual assault web-site, and provides support to victim service providers.

**The Safe Haven Shelter for Battered Women.** *Amicus* The Safe Haven Shelter for Battered Women is a Minnesota shelter that provides a safe environment for battered women and their children. The organization provides crisis shelter, systems change work, and community education. In addition, the organization acts as a

legal advocate, assisting with restraining orders and representing victims in civil and criminal court. The Safe Haven Shelter is in the process of creating and opening a regional Family Justice Center.

**Washington State Coalition Against Domestic Violence.** *Amicus* Washington State Coalition Against Domestic Violence (“WSCADV”) is a non-profit organization, incorporated in the state of Washington. Founded in 1990 by domestic violence survivors, WSCADV is a statewide membership organization that organized to share resources, develop common strategies and strengthen community responses to domestic violence throughout the state. WSCADV’s core commitment is to support domestic violence survivors by providing emergency shelter and advocating for laws and public policies that promote safety and justice for domestic violence victims. WSCADV also conducts statewide trainings for law enforcement officers and prosecutors about domestic violence, addresses the needs of domestic violence survivors, and assists local communities to implement best practices in the investigation and prosecution of domestic violence cases.

**Wisconsin Coalition Against Domestic Violence.** *Amicus* Wisconsin Coalition Against Domestic Violence (“WCADV”) is a not-for-profit membership organization of battered women, formerly battered women, and domestic abuse programs, all committed to ending domestic violence. Founded in 1978, mission of WCADV is to end violence against women through partnerships,

advocacy, and direct services. The organization plays an instrumental role in advocating for laws and policies that affect battered women and their children, such as the Violence Against Women Acts of 1994, 2000, and 2005. WCADV also leads statewide efforts to research and analyze domestic violence homicide cases. WCADV releases an annual report that details these homicides and addresses various policy implications.

**Women's Safety and Resource Center.**

*Amicus* Women's Safety and Resource Center is a private non-profit organization that has been dedicated to serving victims of both domestic and sexual violence since 1979. The center provides emergency shelters for both single women and women with children. It offers clients who need longer term support the opportunity of having an apartment of their own. Advocates provide case management to assist these clients in moving forward with their lives. In addition to housing, the organization provides support groups and a 24-hour hotline and crisis response team, as well as court advocacy for restraining order and stalking order petitions.

### Statement of Cheryl Hanna

I, Cheryl Hanna, am a legal academic, and teach Constitutional Law, Evidence and Domestic Violence Law. I have written extensively about the criminal justice system's response to domestic violence. My work in this area has been widely cited, including by this Court in *Castle Rock v. Gonzales*, 545 U.S. 748, 763 (2005). My interest, in accordance with my academic work, is to encourage the criminal justice system to adequately respond to domestic violence within a constitutional framework. Such an approach preserves the liberty and autonomy of both victims and perpetrators.

I join the other *amici* because I believe that the integrity of the Confrontation Clause is preserved by a Forfeiture by Wrongdoing doctrine that does not require a showing that the specific motive behind the wrongdoing was to render the witness unavailable to testify at trial.

Furthermore, the practical implications of such a doctrine would create significant obstacles in prosecuting domestic violence cases by excluding otherwise reliable evidence necessary to ascertain the truth.

Given that domestic violence offenders typically engage in ongoing patterns of both psychological and physical abuse with the intent to exert power and control over victims in all aspects of their lives, in few cases is there evidence that the specific motive of the wrongdoing was to silence the victim at trial. An interpretation of the Forfeiture by

Wrongdoing doctrine that allows for the admissibility of statements when the defendant has engaged in serious and intentional wrongdoing that predictably renders the witness unavailable more accurately reflects the dynamics of abusive relationships and allows the criminal justice system to effectively prosecute domestic violence offenders.

The ability of the state to hold these defendants accountable provides safety for victims and maintains order in a civil society.

Cheryl Hanna  
Professor of Law  
Vermont Law School  
March 11, 2008

### **Statement of Paul Dedinsky**

As a sexual assault, child abuse and domestic violence prosecutor for many years, it has been my job to bring terrified victims and witnesses to court where they must face, and testify in front of, their abusers. Sadly, few victims make that courageous journey to the courthouse. Many have succumbed to intimidation and threats. Others believed their abusers' promises, hoping for change and a better life.

Please understand that it is not prosecutors who seek to prevent the statements of victims and witnesses from being tested in the crucible of cross-examination. It is the abusers who ensure that the victims' statements not be tested in either cross or direct examination. Since the *Crawford* decision, our courts have been subjected to abusers who, through repeated control of their victims, control the outcome of their cases. In my jurisdiction, conviction rates have plummeted. Through the intimidation and manipulation of victims, offenders now easily escape accountability.

Paul Dedinsky, Assistant District Attorney  
Milwaukee County District Attorney's Office  
March 17, 2008

### Letter from Julie Jensen

Pleasant Prairie Police Department,  
Ron Kosman or Detective Ratzenburg-

I took this picture and am writing this on Saturday, 11-21-98 at 7AM. This "list" was in my husband's business daily planner—not meant for me to see. I don't know what it means, but if anything happens to me, he would be my first suspect. Our relationship has deteriorated to the polite superficial. I know he's never forgiven me for the brief affair I had with that creep seven years ago. Mark lives for work and the kids; he's an avid surfer of the Internet . . . .

Anyway, I do not smoke or drink. My mother was an alcoholic, so I limit my drinking to one or two a week. Mark wants me to drink more—with him in the evenings. I don't. I would never take my life because of my kids—they are everything to me! I regularly take Tylenol and multi-vitamins; occasionally take OTC stuff for colds, Zantac, or Immodium; have one prescription [sic] for migraine tablets, which Mark uses more than I.

I pray I'm wrong and nothing happens . . . but I am suspicious of Mark's suspicious behaviors and fear for my early demise. However, I will not leave \_\_\_\_\_ and \_\_\_\_\_. My life's greatest love, accomplishment and wish: "My 3 D's"—Daddy (Mark), \_\_\_\_\_ and \_\_\_\_\_.

Julie C. Jensen