I. WARNING: ROUGH WATERS AHEAD—PROCEED WITH CAUTION

The United States Constitution’s Confrontation Clause guarantees “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”1 This provision, as construed by the Court in Crawford v. Washington,2 protects a criminal defendant from the admissibility of testimonial out-of-court statements made by an unavailable witness, if the defendant has not had a prior opportunity to cross-examine the witness.3 Even since the Court’s seminal decision in Crawford, the entire sea of Sixth Amendment Confrontation Clause jurisprudence has been nothing but rough waters. In Crawford, the Court overturned decades of precedent regarding the Confrontation Clause by re-examining it through an originalist lens.4 Even though the Court completely reformulated the Confrontation Clause’s application, the Court provided minimal guidance and explanation as to its contours and exceptions.5

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1 U.S. CONST. amend. VI; see also Pointer v. Texas 380 U.S. 400, 403 (1965) (extending the federal right to confront witnesses to the states based on the Fourteenth Amendment).
3 Id. at 68.
4 See id. at 60–68; see also Thomas Y. Davies, What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington, 71 BROOK. L. REV. 105, 105 (2005) (defining the originalist approach as a method of interpreting constitutional provisions according to “the public meaning that a constitutional provision carried at the time the provision was framed”).
5 In Crawford, the Court overturned the previous test from Ohio v. Roberts, 448 U.S. 56 (1980), which stated that the Confrontation Clause does not bar admission of an unavailable witness’s statement against a criminal defendant if the statement bears “adequate indicia of reliability.” Crawford, 541 U.S. at 42 & 68–69. In its place, the Court pronounced that the Confrontation Clause guarantee applies to “witnesses” who make “testimonial” statements. Id. at 59. Therefore, “testimonial” statements are barred from admission by the Sixth (continued)
In 2006, the Court attempted to calm the turbulent waters created by *Crawford* with its decisions in *Davis v. Washington*\(^6\) and the companion case, *Hammon v. Indiana*.\(^7\) In the combined decision, the Court expounded upon *Crawford* by adding an element of “primary purpose”\(^8\) and applying a set of outside limitations as to what “testimonial” means through a few examples of “testimonial” statements.\(^9\) Notably, in *Crawford*, the Court stated that the only exceptions to this re-worked Confrontation Clause standard were those that existed at the time of the founding of our nation, but gave only brief mention to what they were and how they would actually be applied and interpreted.\(^10\)

In the wake of these landmark decisions, it was only a matter of time before a case like *Giles v. California*\(^11\) made an appearance in front of the Court. *Giles* forced the Court to consider and make a definitive ruling on the “forfeiture by wrongdoing” exception as applied against the newly interpreted Confrontation Clause.\(^12\) Again, the Court took an originalist Amendment if the witness is unavailable to testify at trial and the criminal defendant had a prior opportunity to cross-examine that person. *Id.* However, the Court explicitly refused to define the contours of “testimonial.” *Id.* at 68. Instead, the Court defined a limited number of statements which are “testimonial” such as “affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine . . . depositions, confessions, and statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* at 51–52.

\(^7\) *Id.*
\(^8\) *Id.* at 822. The Court stated:

> Statements are nontestimonial when made in the court of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Id.* (emphasis added).

\(^9\) See *id.* at 829 (distinguishing the instant case from a line of English cases because they did not involve “statements made during an ongoing emergency”).

\(^10\) *Crawford*, 541 U.S. at 54, 56 n.6.
\(^12\) *Id.* at 2682.
approach to its examination of the forfeiture by wrongdoing exception.\textsuperscript{13} Ultimately, in a plurality opinion written by Justice Scalia, the Court held that the forfeiture by wrongdoing exception permits the introduction of statements made by an unavailable witness only if they were “‘detained’ or ‘kept away’ by the ‘means or procurement’ of the defendant.”\textsuperscript{14} In other words, the exception only applies when defendants engaged in conduct specifically designed to prevent witnesses from testifying, regardless of whether the state has initiated criminal proceedings against the defendant.\textsuperscript{15}

Despite the plurality’s persuasive analysis of the common law at the time of the founding and the justices’ admirable attempt to calm the storm, they misconstrued the forfeiture by wrongdoing exception, leaving us with a false sense of security. A closer examination of the English common law cases and early American cases upon which the plurality heavily relied evidences the failure in interpretation.\textsuperscript{16} This examination shows that these cases provide only minimal support for the Court’s decision, due to a complete lack of attention given to the time limitations inherent to the exception, and any support built thereon is completely misplaced. In addition, the Court stated that Federal Rule of Evidence 804(b)(6) was a codification of the forfeiture doctrine;\textsuperscript{17} yet, an analytical comparison of Giles to Federal Rule of Evidence 804(b)(6) shows material discrepancies between the holding in Giles and the rationale behind the rule. Lastly, the analysis in Giles does not meld with prior Court decisions involving fundamental constitutional rights and the doctrines of “waiver” and “forfeiture.” The conclusion shows that the forfeiture by wrongdoing exception should be limited in its application to only those cases that involve post-indictment, post-crime, or post-investigation witness tampering, and wrongdoing.

II. \textit{Giles v. California}—Ex-Girlfriends and Guns: A Recipe for Disaster and Misinterpretation

The facts in Giles are fairly straight forward. Defendant Dwayne Giles was charged with the murder of his ex-girlfriend, Brenda Avie, for allegedly shooting her “outside the garage of his grandmother’s house.”\textsuperscript{18}

\textsuperscript{13} \textit{Id.} (considering whether the rule “is a founding-era exception to the confrontation right”).

\textsuperscript{14} \textit{Id.} at 2683.

\textsuperscript{15} \textit{See id.}

\textsuperscript{16} \textit{See id.} at 2682–84.

\textsuperscript{17} \textit{Id.} at 2687; \textit{see also} Davis v. Washington, 547 U.S. 813, 833 (2006).

\textsuperscript{18} Giles, 128 S. Ct. at 2681.
There were no eyewitnesses, but Giles’ niece had overheard him and Avie initially “speaking in conversational tones,” but then Avie yelled “Granny!” several times, followed by gunfire.\(^{19}\) After analyzing the multiple gunshot wounds, it was found that Avie was shot once while “holding her hand up,” again while “turning to her side,” and a third time “while lying on the ground.”\(^{20}\) “At trial, Giles testified that he acted in self-defense.”\(^{21}\) Giles contended that Avie had threatened his life and the life of his new girlfriend several times in the past.\(^{22}\) He alleged that on the day of the shooting, after she “charged at him, . . . he closed his eyes and fired several shots,” but did not intend to kill her.\(^{23}\)

The prosecution sought to introduce the out-of-court statements Avie made to the police several weeks prior to the shooting.\(^{24}\) These statements accused Giles of domestic abuse and severe violence, which would have effectively nullified his self-defense claim.\(^{25}\) The California Supreme Court ruled that Giles’ intentional criminal act qualified as wrongdoing, and therefore, Avie’s statements were admissible under the forfeiture by wrongdoing exception to the Confrontation Clause.\(^{26}\) Giles ultimately appealed to the United States Supreme Court, which overturned the decision because the California Supreme Court applied the forfeiture by wrongdoing exception in a manner “unheard of at the time of the founding or for 200 years thereafter.”\(^{27}\)

The plurality based its holding on their interpretation of how courts applied the exception at the time of the founding.\(^{28}\) The plurality stated that the forfeiture by wrongdoing exception “permitted the introduction of statements of a witness who was ‘detained’ or ‘kept away’ by the ‘means or procurement’ of the defendant.”\(^{29}\) In defining what “means or procurement” meant, the Court examined several early English common law cases to determine its historical meaning.\(^{30}\) The plurality also pointed
to historical sources supporting a “purpose-based definition of these terms . . . [stating that] prior testimony was admissible when a witness was kept away by the defendant’s ‘means and contrivance.’”

Despite the plurality’s seemingly thorough historical analysis, they failed to recognize the implicit time requirement. Due to this failure, the plurality did not incorporate any time restrictions or limitations into its holding. Instead, it held that to properly invoke the exception, the prosecution must show that the defendant intended to keep the witness from testifying at trial, and that his or her wrongful conduct was specifically designed to prevent the witness from testifying against them, regardless of the timing of the defendant’s wrongdoing. In addition, the defendant’s mere knowledge that his actions would cause the witness’s unavailability is insufficient to trigger the exception. In Giles, this interpretation forced the prosecution to prove that, at the time of the shooting, Giles killed Avie with the specific intent, not only to kill her, but also to make her unavailable to testify against him.

Justice Souter wrote a concurring opinion, joined in part by Justice Ginsburg, to express his concern over the different possible interpretations of the common law English and early American cases. He argued that because the plurality and dissent analyzed the exact same cases, yet reached completely opposite conclusions, those cases “were not calibrated finely enough to answer the narrow question here.” His concurring opinion focused on the forfeiture by wrongdoing exception as applied in the domestic abuse setting and how the element of intent would almost always be satisfied in those circumstances.

Justice Breyer’s dissent, joined by Justices Stevens and Kennedy, also took an originalist approach to the exception and attempted to rebuff the
The dissent argued that the language used by the English common law and early American courts, which set forth the exception, is “broad enough to cover the wrongdoing at issue in the present case (murder) and much else besides.” The dissenting opinion used the exact same cases as the plurality to demonstrate a lack of support for the plurality’s intent and purpose-based definition of the exception. It also stated, “[K]nowledge is sufficient to show the intent that law ordinarily demands.” In the dissenters’ views, whenever a person intentionally murders someone, courts should presume the murderer anticipated that the killing would make the victim unavailable to testify and that the killer intended the result. Lastly, it stated that requiring purpose or intent is in direct conflict with the exception’s ethical objectives, which is to not allow persons to take advantage of their own wrongdoing, plain and simple. Although the dissent and concurring opinions shed some light on the faulty foundation of the plurality’s holding, a closer examination of that shaky support further reveals its inherent flaws.

A. The Historical Backdrop and Analytical Review of the Plurality Opinion in Giles v. California

1. A Lesson in History—Getting Back to Our Roots: Historical Analysis of Early English and American Case Law Developing and Applying the Forfeiture by Wrongdoing Exception

Prior to Giles, the Court mentioned there were only two exceptions to the Sixth Amendment Confrontation Clause guarantee: statements made as “dying declarations” and situations where the doctrine of forfeiture by wrongdoing applies. In Giles, the plurality relied upon English common law and early American cases that applied and interpreted the forfeiture by wrongdoing exception, however, their reliance was misplaced because those cases, although standing for the creation of a forfeiture by

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38 Id. at 2695–96 (Breyer, J., dissenting).
39 Id.
40 Id. at 2700–02.
41 Id. at 2698 (emphasis in original).
42 Id. (citations omitted).
43 Id. at 2699.
45 Giles, 128 S. Ct. at 2683–87 (plurality opinion).
wrongdoing exception, did so under materially different circumstances from those present in Giles.

In Lord Morley’s Case, the earliest case cited by the Court in support of their rationale, the defendant was indicted for murder. A witness who provided an incriminating deposition to the coroner had disappeared prior to trial. In this case, it was clear that the witness had disappeared in anticipation of the trial; however, there was no evidence that Lord Morley procured the witness’s unavailability. Therefore, due to this lack of evidence, the deposition of the unavailable witness was not admissible. The paramount concern in this case was that Lord Morley, regardless of whether he procured the absence of the witness, could not have possibly done so until after he had committed the murder, and after he knew that he was going to be on trial.

In the case of Henry Harrison, the House of Lords relied upon the precedent set in Lord Morley’s Case to reach its decision. Here, the defendant was also charged with murder, and a witness who provided an incriminating deposition was unavailable at trial. However, this time the House of Lords heard testimony from the witness’s friend, who testified that someone had offered the witness money to not testify. This was sufficient evidence for the House of Lords to determine that Mr. Harrison procured the absence of the witness, thus satisfying the forfeiture by wrongdoing exception. This determination made the incriminating depositions admissible against Mr. Harrison. Again, it is important to note the action that procured the absence of the witness, and the requisite mental state accompanying it, did not and could not, occur until after the defendant had committed the crime and after he knew he was going to be on trial.

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46 6 How. St. Tr. 769 (H.L. 1666).
47 Id.
48 Id. at 770–71.
49 Id. at 776–77.
50 Id.
51 12 How. St. Tr. 833 (H.L. 1692).
52 Id. at 852.
53 Id. at 851–53.
54 Id. at 851–52.
55 See id. at 853.
56 Id.
In *Queen v. Scaife*, a defendant, tried with co-defendants, appealed his conviction for “robbery with violence.” Here, the Crown proved that the defendant procured the absence of a witness who provided an incriminating deposition; however, the other two defendants had nothing to do with the procurement. The Queen’s Bench held the incriminating deposition was admissible against only the procuring defendant, and not against the other two defendants. Again, this case involved the defendant causing the absence of a witness after the crime was committed and after he was arrested for the crime.

Two of the early American cases cited in support of the plurality’s opinion are *Rex v. Barber* and *Williams v. State*. In *Rex*, a witness who testified before an officer of the peace, as well as the grand jury, was unavailable to testify in front of a jury due to actions taken by a friend of the defendant. The court held that the jury could hear the testimony the witness gave to the officer and grand jury because the defendant had procured the witness’s absence. In *Williams*, the defendant “was indicted for larceny of a watch, from a man named Thomas.” Thomas provided the incriminating testimony against Williams in a deposition to a magistrate. Thomas and the defendant settled out of court, but Williams was still under prosecution. The Solicitor General argued the defendant procured the absence of Thomas because he was missing at the time of trial. The court recited the rule from *Lord Morley’s Case*: a deposition by a witness who “was detained by the means or procurement of the prisoner . . . should be read” at trial. Ultimately, the court decided that the Solicitor General did not have enough evidence to prove the defendant actually procured Thomas’ absence, and Thomas’ deposition was not

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58 Id. at 1271.
59 Id.
60 Id.
61 1 Root 76 (Conn. 1775).
63 *Rex*, 1 Root at 76.
64 Id.
65 Williams, 19 Ga. at 402.
66 Id. at 402–03.
67 Id. at 402.
68 Id.
69 Id. at 403.
admitted. As both of these cases further illustrate, the defendants had already committed the crime when absences of the witnesses were or were not procured, and they both already knew that they were going to trial.

These cases all apply the common law exception of forfeiture by wrongdoing as it existed at the time of the founding. All of the cases cited in support of the plurality’s opinion involved witness tampering occurring after the defendants had committed the crime, after they had been indicted, and after they knew they were going to be put on trial for their alleged crimes. Therefore, it is peculiar that the plurality, with its extreme emphasis and devotion to an originalist approach, would overlook such an obvious limitation on the application of the exception. This temporal limitation on the application of the forfeiture by wrongdoing exception strongly indicates that it was not meant to be applied to actions occurring before the crime had been committed.

2. A Lesson in History—Wait, Did I Say That?—United States Supreme Court Recognition of the Forfeiture by Wrongdoing Exception

The Supreme Court first recognized the doctrine of forfeiture by wrongdoing in Reynolds v. United States. In Reynolds, the United States indicted the defendant, Mr. Reynolds, for bigamy. When the U.S. Marshall went to Mr. Reynolds’s residence with a subpoena for Mary Jane Schobold, Mr. Reynolds stated she was not available. Later, the government discovered that the name on the subpoena was incorrect and that the second wife’s name was actually Amelia Jane Schofield. The U.S. Marshall then returned to Mr. Reynolds’s residence with a corrected subpoena. This time he spoke with Mr. Reynolds’s first wife, Mary Ann Tuddenham, who told the U.S. Marshall that Amelia Jane Schofield was not present and had not been there for three weeks. During his trial, the court admitted, over the objection of the defendant, the testimony of Amelia Jane Schofield given at a prior trial involving the exact same

70 Id.
72 98 U.S. 145 (1878).
73 Id. at 146.
74 Id. at 148.
75 Id. at 148–49.
76 Id. at 149.
77 Id.
charges against Mr. Reynolds.\textsuperscript{78} The defendant appealed this admission to the Supreme Court.\textsuperscript{79}

Although not naming the doctrine, the Court applied the forfeiture by wrongdoing exception.\textsuperscript{80} In its discussion, the Court cited \textit{Lord Morley’s Case}, \textit{Harrison’s Case}, \textit{Queen v. Scaife}, and \textit{Williams v. State} to determine the exception’s proper application.\textsuperscript{81} The Court also stated the exception stems from the maxim that “no one shall be permitted to take advantage of his own wrong,” and the maxim is properly applied where the witness has been “wrongfully kept away” from giving testimony at trial.\textsuperscript{82} Therefore, it was proper to admit the prior testimony of Amelia Jane Schofield even though the defendant had no prior opportunity to cross-examine her.\textsuperscript{83} Justice Waite, writing for the Court, stated:

\begin{quote}
The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.\textsuperscript{84}
\end{quote}

Although the Court did not expressly mention temporal limitations on the application of the doctrine, it did not need to because the facts of the decision imply such limitations.\textsuperscript{85} The facts in \textit{Reynolds} were temporally similar to the historical cases cited for the foundation of the forfeiture by wrongdoing exception. Mr. Reynolds was already indicted for the crime and knew his trial was imminent at the time when he allegedly procured the witness’s absence.\textsuperscript{86} When citing the earlier cases, the Court was effectively citing and approving the chronological limitations inherent within the cases. In fact, every case cited in support of the forfeiture by

\textsuperscript{78} \textit{Id.} at 150.
\textsuperscript{79} \textit{Id.} at 151.
\textsuperscript{80} \textit{Id.} at 158 ("The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege.").
\textsuperscript{81} \textit{Id.} at 158–59.
\textsuperscript{82} \textit{Id.} at 159.
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.} at 158.
\textsuperscript{85} \textit{See id.} at 158–59.
\textsuperscript{86} \textit{Id.} at 159–60.
wrongdoing exception involved actions by the defendant after he committed the crime, and the facts in Reynolds were no different. Therefore, much like the cases cited with approval by the Court, the witness tampering occurred after the crime and after the defendant knew of the indictment.

B. History Was Always My Worst Class—A Common Sense Approach to the Forfeiture by Wrongdoing Exception

The forfeiture by wrongdoing exception, as it existed at the time of the founding, applied exclusively to situations where the defendant acted wrongfully after he or she committed the crime and after an indictment. Arguably, those cases are not “calibrated finely enough” to provide a clear solution to the problems with applying the exception. Fortunately, the plurality opinion is also susceptible to commonsense attacks.

1. Lesson One—English 101: Words and Definitions

The plurality based its holding solely on the definition of a few key words, specifically, “means or procurement.” The plurality quickly discussed several dictionaries and criminal law treatises that existed during the founding-era. It concluded that “procurement” could be defined two ways: (1) that a defendant merely caused the witness’s absence; or (2) the defendant designed his or her conduct specifically to bring about the result. Similarly, the plurality found conflicting definitions of the word “means.” It may include “all cases in which a defendant caused a witness to fail to appear” or when he or she employs a third person “for the purpose of making a witness absent.” Next, the plurality consulted two evidence treatises existing near the time of the founding, which state the exception as using the language of “means or contrivance” with “a purpose-based definition.” Ultimately, the plurality defined “contrivance” as an act of planning, devising, or something done with

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87 See discussion supra Part II.A.1.
89 Id. at 2683 (plurality opinion).
90 Id. at 2683–84.
91 Id. at 2683.
92 Id. at 2683–84.
93 Id. at 2683.
94 Id. at 2683–84.
Thus, the meaning of the phrase “means or procurement” should be read to include an intent or purpose-based motive. The dissent quibbled over the accurateness of the plurality’s definition of “means or procurement” by citing the exact same sources, yet coming to a different conclusion. The dissent determined that “means or procurement” included murder in the early cases, which means that “knowledge” was enough to prove intent. Therefore, anytime someone intentionally kills another, that person automatically forfeits his or her Sixth Amendment Confrontation Clause guarantee because the killer knew that, as a result of that action, the victim would not be available to testify at trial.

Whether the definition of “means or procurement” accurately reflects the exception as it existed at the founding is important, but not completely decisive. One must keep in mind that the Confrontation Clause guarantees the right of the accused “to be confronted with the witnesses against him.” In a previous case, Justice Scalia joined Justice Thomas in stating that the phrase “witnesses against him” is “the critical phrase within the Clause.” Remember also, the forfeiture by wrongdoing exception, as stated by the plurality, is an exception to the Confrontation Clause that permits the introduction of statements of a witness who was ‘detained’ or ‘kept away’ by the ‘means or procurement’ of the defendant.” Oddly enough, neither the plurality nor the dissent in Giles gave the term “witness” any critical attention. However, if one defines the term “witness” in an originalist fashion, which seems to be in favor with the current Court, it creates a temporal limitation within the exception.

Defining “witness” is more difficult than it seems. In Maryland v. Craig, White v. Illinois, and United States v. Hubbell, members of the Court examined the meaning of the word “witness” as it existed at the

95 See id. at 2684.
96 See id.
97 Id. at 2696–97 (Breyer, J., dissenting).
98 Id.
99 Id. at 2698.
100 U.S. CONST. amend. VI (emphasis added).
102 Giles, 128 S. Ct. at 2683 (plurality opinion).
103 See discussion infra Part II.B.1.
time of the founding. The final holdings of those cases are irrelevant to the instant discussion, but the analyses undertaken by Justice Thomas and Justice Scalia in their concurring and dissenting opinions are of particular importance.

Using an originalist approach, the dissenting and concurring Justices focused mainly on the definition of the word “witness” as it existed at the time of the founding. The Court has rejected the strict definition interpreting witnesses as only those persons who provide in-court testimony. Therefore, a more broad definition of the term “witness” is appropriate. When defining “witness,” members of the Court have done so in light of the purpose behind the Confrontation Clause. The main purpose behind the Clause was a response to the ongoing abuses in the English Courts, which convicted defendants by unavailable witness testimony or depositions read into the record, even though the defendant never had an opportunity to challenge the testimony. The Court has repeatedly affirmed this viewpoint stating, “[T]he principle evil at which the Confrontation Clause was directed was . . . [the] use of ex parte examinations as evidence against the accused.”

It is important to highlight that justices of the peace obtained the statements that were of concern to the Confrontation Clause after the crimes had already been committed.

In fact, the main case discussed regarding the purpose of the Confrontation Clause was Sir Walter Raleigh’s Case, in which an accomplice provided incriminating statements outside of Sir Raleigh’s presence that were later read at his trial. Sir Raleigh demanded that his accomplice appear in court. The court refused his demand, and

107 See Craig, 497 U.S. at 863–66 (Scalia, J., dissenting); White, 502 U.S. at 358–64 (Thomas, J., concurring); Hubbell, 530 U.S. at 49–51 (Thomas, J., concurring).
108 See cases cited supra note 107.
109 See cases cited supra note 107.
111 See cases cited supra note 107.
112 Crawford, 541 U.S. at 50; White, 502 U.S. at 361 (Thomas, J., concurring).
113 Crawford, 541 U.S. at 50; see also Dutton v. Evans, 400 U.S. 74, 94 (1970) (Harlan, J., concurring) (“[T]he paradigmatic evil the Confrontation Clause was aimed at [was] trial by affidavit.”).
114 Crawford, 541 U.S. at 43.
115 2 How. St. Tr. 1 (H.L. 1603).
116 Id. at 15–16.
117 Id.
ultimately convicted Raleigh and sentenced him to death.\textsuperscript{118} It is obvious that the only possible way Sir Raleigh’s accomplice could have given statements regarding the crime is if the crime had \textit{already} been committed.

With this background in mind, Justice Thomas defined “witness,” in the minds of the Founders, to mean “a person who gives or furnishes evidence.”\textsuperscript{119} This definition implies that the person has reason to give or furnish evidence (i.e., someone is under investigation, under indictment, or under arrest, and the state needs their testimony, thus making them a “witness”).

Combining all of the information adduced so far—the definition of “witness” and “means or procurement” as they were understood at the time of the founding, the language of the Confrontation Clause itself, the purpose behind the creation of the Confrontation Clause, and the newly formulated interpretation of the clause—only one feasible conclusion can be made: the Confrontation Clause was only meant to apply to statements made \textit{after} a person has been indicted, \textit{after} a crime had been committed, or \textit{after} an investigation was underway. Therefore, any exceptions to the clause must also apply only to post-indictment, post-crime, or post-investigation actions taken by the defendant.

2. \textit{Lesson Two—Study Hall: Time for Review}

First, a witness is a “person who gives or furnishes evidence,” and the Sixth Amendment’s Confrontation Clause guarantees those accused to confront the witnesses against him.\textsuperscript{120} A literal reading of the Sixth Amendment alone should suffice to prove the point because it refers to those persons who are \textit{already} “accused” in a “criminal prosecution.”\textsuperscript{121} When read on its face, it only applies to those persons already under indictment for a crime and who are standing trial. Moreover, in the context of the Sixth Amendment, the term “witness” is always used along with “evidence,” which generally connotes proving something at trial.\textsuperscript{122} Thus,

\textsuperscript{118} \textit{Id.} at 24.
\textsuperscript{120} See discussion \textit{supra} Part II.B.1; U.S. CONST. amend. VI.
\textsuperscript{121} U.S. CONST. amend VI.
\textsuperscript{122} See \textsc{Black’s Law Dictionary} 595 (8th ed. 2004) (defining evidence as “[s]omething . . . that tends to prove or disprove the existence of an alleged fact”); \textsc{The American Heritage College Dictionary} 475 (3d ed. 1993) (defining evidence as “[a] thing or things helpful in forming a conclusion or judgment”); \textsc{Webster’s New International Dictionary of the English Language} 788 (3d. ed. 1981) (defining evidence as “something that furnishes or tends to furnish proof”).
when defining the term “witness” in context, it must be defined as someone who will be presenting evidence, which implicitly means that the accused is already at trial, and the evidence will be used either for or against him because evidence is introduced to prove a conclusion. The Sixth Amendment is concerned with criminal trials in which out-of-court statements are introduced to prove the guilt of defendants. Therefore, the term “evidence” also automatically assumes that one has already been indicted or is already at trial.

Second, the purpose of the Confrontation Clause is to ensure that those at trial have a right to cross-examine the witnesses testifying against them. The only way a person could testify against another is if the second person is a criminal defendant. Indeed, the case highlighted and discussed by the Court in Crawford was Sir Walter Raleigh’s Case, who was already under indictment.

Third, the Court’s interpretation of which statements are considered “testimonial” and governed by the Confrontation Clause implicitly require that the statements be made post-indictment, post-crime, or post-investigation. In Davis, the Court held that statements are “testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”

If the primary purpose of the statements is to “prove past events potentially relevant to later criminal prosecution,” then it necessarily assumes a criminal act has already occurred.

Finally, the application of the forfeiture by wrongdoing exception proposed by the plurality in Giles is completely circular and akin to “dispensing with the jury trial because the defendant is obviously guilty.” The plurality maintained that courts must determine whether the defendant intended to procure the absence of the witness. Although this sounds logical, in the context of a trial where the defendant is charged with murder and the prosecution attempts to introduce statements by the victim, that analysis would force the court to pre-determine guilt of murder.

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125 Id. at 44.
128 Id. at 2684.
Obviously, the victim would be unavailable for trial because he or she is deceased, and when ruling on the admissibility of the deceased victim’s statements, the only way to prove the defendant acted with the intention to prevent the victim from testifying at trial is to prove that the defendant intentionally murdered the victim. Therefore, if courts determine that the defendant procured a witness’s absence, it is the same as saying he or she intentionally killed the witness, which is the exact issue at trial. This process completely dispenses with the right of trial by jury. The only way to avoid this pre-determination of guilt is to ensure that the forfeiture by wrongdoing exception applies to only actions by the defendant post-indictment, post-crime, or post-investigation.

In light of the history and definitions implicit in the Confrontation Clause, it is quite apparent that the exception ought to apply to situations only after the indictment or after the crime has been committed. In addition, as the Confrontation Clause itself applies to only statements made at trial, an exception cannot logically exist before the requirement to which it is an exception even arises. In other words, how can someone “forfeit” his or her Sixth Amendment right to confront witnesses against

129 Even when defendants admit to killing a victim, and they claim self-defense, the determination that they intentionally procured the absence of the victim-witness by killing him or her assumes that they unlawfully killed the victim-witness. For instance, the defendant in Giles claimed he did not intend for Avie to die, but rather when she “charged at him . . . he closed his eyes and fired several shots” in her direction. Giles, 128 S. Ct. at 2681. However, a judicial determination that he intentionally procured her absence is a pre-determination of his guilt of intent to murder. It also completely refutes his claim of self-defense. The difference between intent to procure the absence and intent to murder, when the death of the victim is the cause of the absence, becomes indistinguishable and amounts to a pre-determination of guilt.

130 It is important to note that under Federal Rule of Evidence 104(a), the judge determines admissibility of evidence using a preponderance of the evidence standard. See Bourjaily v. United States, 483 U.S. 171, 175 (1987). Although this standard is used for admissibility purposes only, see id. at 175, and is lower than the usual “beyond a reasonable doubt” standard used for determining substantive guilt, see Giles, 128 S. Ct. at 2694 (Souter, J., concurring), it still has the effect of pre-assessing guilt before the defendant actually stands trial. Further, even though the admissibility hearing would be conducted out of the jury’s presence, the fact that the evidence is even admissible signifies that the judge has pre-assessed the case, and determined by a preponderance of the evidence that the defendant intentionally killed the declarant. Giles, 128 S. Ct. at 2694 (Souter, J., concurring).

131 See discussion infra Part IV.A (using the term “forfeit,” despite its misleading title, because the doctrine is called “forfeiture by wrongdoing”; however, the ensuing discussion (continued)
him or her before that right even attaches or applies? Common sense provides that people cannot lose something before they ever had it to begin with, which is exactly why the forfeiture by wrongdoing exception must only apply to those actions taken by defendants after they are indicted, after they are under grand jury investigation, or after the crime has been committed. Further, the Sixth Amendment strictly prohibits predetermination of guilt, even though a logical application of the rationale contained in the Giles plurality opinion would require such a determination. Therefore, the interpretation of the forfeiture by wrongdoing exception by the plurality in Giles is an unsound and incorrect application of the exception.\footnote{See Giles, 128 S. Ct. at 2693. By interpreting the “forfeiture by wrongdoing” exception as suggested in this note, the outcome would have been the same as the plurality in Giles, but for completely different reasons. Under this interpretation, the doctrine would not have applied to the facts in Giles because the statements were made prior to the crime, thereby reversing the California Supreme Court’s decision.}

III. FEDERAL RULE OF EVIDENCE 804(B)(6)

To support an inherent time limitation contained within the forfeiture by wrongdoing doctrine further, I examine Federal Rule of Evidence 804(b)(6), entitled “Forfeiture by Wrongdoing.”\footnote{FED. R. EVID. 804(b)(6).} The rule maintains a statement is not hearsay, and therefore, admissible, if it is a “statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”\footnote{Id.} In Davis, the Court stated, “Federal Rule of Evidence 804(b)(6) codifies the forfeiture doctrine.”\footnote{Davis v. Washington, 547 U.S. 813, 833 (2006).} The plurality in Giles acknowledged this prior statement and quickly dismissed any complications it may impose.\footnote{Giles, 128 S. Ct. at 2687–88 (devoting merely one paragraph to Federal Rule of Evidence 804(b)(6) and briefly concluding that all commentators to Federal Rule of Evidence 804(b)(6) agree with the Court’s interpretation).} Much like its case law analysis, the plurality did not address any temporal limitations or issues concerning the doctrine as codified in Federal Rule of Evidence 804(b)(6); however, looking at the history of the rule, such a limitation cannot be overlooked nor so easily dismissed.
Federal Rule of Evidence 804(b)(6) was meant to be a “prophylactic rule to deal with abhorrent behavior” such as witness tampering because it “strikes at the heart of the system of justice itself.”137 The rule was “desirable as a matter of policy in light of the large number of witnesses who are intimidated or incapacitated so that they do not testify.”138 The cases of United States v. Thevis139 and United States v. Mastrangelo140 were important during the drafting and proposal stages of the rule and prove quite relevant to the instant discussion.141

In Thevis, the defendant faced a trial for violating the Racketeer Influenced and Corrupt Organizations Act (RICO), as well as other related murders and arsons.142 Thevis was charged with the murder of his former co-conspirator, Underhill.143 Thevis and Underhill both were arrested for violating RICO; however, Underhill agreed to work with the government and provide testimony against Thevis in exchange for immunity.144 Thevis escaped from prison, and during his time at large, he murdered Underhill.145 In a confession to his cellmate, Thevis admitted to murdering Underhill because he “intended to testify against him” at trial.146 The court outlined a two-part test to determine whether the defendant forfeited his right to confrontation: (1) whether “the defendant caused the witness’ unavailability (2) for the purpose of preventing that witness from testifying at trial.”147 This test supplied the foundation for the current version of Federal Rule of Evidence 804(b)(6).148

137 ADVISORY COMM. ON EVIDENCE RULES, NOTES TO FED. R. EVID. 804(B)(6) (quoting United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982)).
139 665 F.2d 616 (5th Cir. 1982).
140 693 F.2d 269 (2d Cir. 1982).
142 Thevis, 665 F.2d at 621–25.
143 See id. at 624.
144 Id. at 623.
145 Id. at 623–24.
146 Id. at 624.
147 Id. at 633 n.17.
In *Mastrangelo*, the defendant was arrested for a series of crimes related to the importation of large quantities of marijuana and methaqualone tablets.\textsuperscript{149} The key link between Mastrangelo and the crimes was “his purchase of four trucks which were seized by federal narcotic agents while loaded with the drugs.”\textsuperscript{150} Bennett, the person who sold Mastrangelo the trucks, testified before a grand jury that he did sell him the trucks.\textsuperscript{151} During his testimony, Bennett played a recorded conversation that could be reasonably interpreted to contain threats against Bennett if he were to testify against him at trial.\textsuperscript{152} In an unsurprising turn of events, two men, allegedly working for Mastrangelo, murdered Bennett the morning before the trial.\textsuperscript{153}

Both of these cases involved persons who were already under indictment and were awaiting trial when the wrongdoing occurred.\textsuperscript{154} Additionally, in both instances, the defendants did not commit the actions of wrongdoing until after their arrests.\textsuperscript{155} Ultimately, each court found that the defendants forfeited their right to confrontation due to their actions of violence against witnesses who intended to testify against them.\textsuperscript{156} Coincidentally, the material and operative facts of these two cases closely mirror those of the English common law and early American cases already discussed.\textsuperscript{157} Remembering that *Thevis* and *Mastrangelo* were fresh in the minds of the drafters during the creation of Federal Rule of Evidence 804(b)(6),\textsuperscript{158} it is clear that the application of the rule embodies the exception as it existed at common law. It addresses situations involving post-indictment, post-investigation, or post-crime witness tampering and wrongdoing, and seeks to prevent the accused from engaging in such conduct.

\textsuperscript{149} United States v. Mastrangelo, 693 F.2d 269, 271 (2d Cir. 1982).
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} United States v. Thevis 665 F.2d 616, 621–25 (5th Cir. 1982); *Mastrangelo*, 693 F.2d at 271.
\textsuperscript{155} *Thevis*, 665 F.2d at 621–25; *Mastrangelo*, 693 F.2d at 271.
\textsuperscript{156} *Thevis*, 665 F.2d at 632; *Mastrangelo*, 693 F.2d at 273 (stating that, on remand, if Mastrangelo was deemed to have acquiesced in the killing of Bennett, he would have forfeited his Sixth Amendment right to confrontation).
\textsuperscript{157} See discussion supra Part II.A.
\textsuperscript{158} See Confrontation, Equity, and the Misnamed Exception, supra note 141, at 1212–13.
The Advisory Committee Meetings and Notes that accompany Federal Rule of Evidence 804(b)(6) further support this interpretation. Records of committee meetings discussing Federal Rule Evidence 804(b)(6) explain that the Committee received an objection to the wording of the rule, which requested the rule be re-written to apply “only when the defendant’s intent is to tamper with a witness.”¹⁵⁹ The Committee overruled the objection, stating that it was “unnecessary to rewrite the rule to refer specifically to witness tampering because the proposed text states that the rule applies only in instances in which the party’s objective was to ‘procure the unavailability of the declarant as a witness.’”¹⁶⁰ Thus, the Committee omitted a specific reference to witness tampering because the drafters believed it was self-evident that preventing witness tampering was the primary purpose of the rule.

Witness tampering can be loosely defined as acting with the intent to prevent someone, either through physical actions or threats, from giving testimony during an official proceeding.¹⁶¹ Considering the definition of “witness” implied in the Confrontation Clause,¹⁶² witness tampering can only logically occur after someone committed a crime. Therefore, the rule’s history shows that the drafting Committee was concerned with witness tampering and prevention. In other words, it was concerned with post-indictment, post-investigation, or post-crime interference with witness testimony.

IV. FORFEITURE, WAIVER, AND THE FORFEITURE BY WRONGDOING EXCEPTION: DUCK, DUCK, GOOSE

Generally, people can lose their fundamental constitutional rights in two ways: forfeiture and waiver.¹⁶³ The most significant difference between the two is a “defendant can forfeit his [rights] without ever having

¹⁶⁰ Id.
¹⁶² See discussion supra Part II.B.
made a deliberate, informed decision to relinquish them.”

In contrast to “waiver, forfeiture occurs by operation of law without regard to a defendant’s state of mind.” On the other hand, “waiver” is “an intentional relinquishment or abandonment of a known right or privilege.” For a waiver to be valid, the person must intelligently waive his right, which in turn depends on the “particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.”

The forfeiture by wrongdoing exception also causes a person to lose a fundamental constitutional right, the right to confrontation, but the Court in Giles omitted a historical examination of the term “forfeiture” or even “waiver.” The lack of scrutiny given to the label placed on the exception itself is peculiar, given that almost the entire opinion in Giles is devoted to the historical meaning of a few words. When examining the terms “forfeiture” and “waiver” as they have developed within our legal system, it is evident that neither concept provides a proper and correct fit for the forfeiture by wrongdoing exception as defined by the plurality.

A. If Only I Had Known—Forfeiture: Causes and Consequences

The forfeiture of constitutional rights occurs “without regard to the defendant’s state of mind” and may occur without a person making an informed decision regarding the specific rights he or she is forfeiting. There are two generally recognized circumstances in which defendants forfeit their rights: first, when they enter a plea of guilty, and second, by procedural default.

Our legal system sets aside “substantial resources” to ensure defendants make the decision to enter a plea of guilty with as much information as possible. Defendants must be represented by counsel, whose job is to provide competent legal advice to their clients. The government must provide defendants with all exculpatory materials in its

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164 Westen, supra note 163, at 1214.
165 Id.
167 Id.
168 See generally Confrontation, Equity, and the Misnamed Exception, supra note 141.
170 Westen, supra note 163, at 1214.
172 Id.
possession. The Constitution also provides defendants with the right to investigate and prepare their cases through the Compulsory Process Clause. Also, courts have an “independent duty” to advise defendants of their “rights and to make specific inquiries about the voluntariness and basis for” their pleas. This process leaves little doubt that defendants are unaware of their choices and the consequences of pleading guilty; however, sometimes rights are unknown or not reasonably foreseeable at the time of entering guilty pleas. Defendants forfeit those rights, even if they are unknown to them at the time of the plea.

When defendants enter guilty pleas, they waive their known rights and forfeit all of their unknown rights that they could have raised at trial. Tollet v. Henderson presents an example of the forfeiture of an unknown right. In Tollet, a grand jury indicted a defendant on a charge of first-degree murder for which he entered a plea of guilty and began serving a ninety-nine year sentence in prison. Later, the defendant petitioned for habeas corpus relief because of an alleged constitutional defect in the grand jury that indicted him. The petitioner was African-American and claimed “his constitutional right [was violated] by systematic exclusion of Negroes from grand jury service.” That violation was unknown to the defendant at the time his attorney advised him to enter a plea of guilty. The Court conceded that the grand jury and its indictment were constitutionally defective, but refused to allow the defendant to challenge the indictment in his habeas petition because he had forfeited his right to challenge the composition of the grand jury by pleading guilty. The Court stated that the defendant’s guilty plea foreclosed any “independent

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175 U.S. CONST. amend. VI.
176 Confrontation, Equity, and the Misnamed Exception, supra note 141, at 1226.
177 Id.
178 Id.
179 Id.
181 Id. at 259.
182 Id.
183 Id.
184 Id. at 260.
185 Id. at 267.
inquiries into the claim of discrimination in the selection of the grand jury.”

Other such unknown rights defendants could forfeit include situations involving illegally seized evidence that they do not know about, possible hearsay and confrontation issues if certain key witnesses move or become incapacitated, or subsequent favorable changes in case law. Further, most criminal defendants are appointed a public defender, who may not have the time or ability to perform extensive and exhaustive research on all of the evidentiary and procedural issues. Therefore, defendants forfeit all of these rights—about which they were probably ignorant despite reasonable prediction and advice from counsel and which could have been invoked if they proceeded to trial—due to their entry of guilty pleas.

Defendants can also forfeit their fundamental constitutional rights by procedural default. Procedural default is “the loss of a right through a failure by the accused or his representative to assert the claim in a prescribed manner or at a required time.” When counsel fails to make timely or proper objections to the admission of evidence, defendants forfeit any rights as to that evidence. Other examples include failure to preserve the trial court record properly to file an adequate appeal or failure to file a timely appeal in the first place. Even though losing constitutional rights through procedural default lacks the formality of guilty pleas, it does share many of the same safeguarding characteristics. In situations that implicate procedural default, defendants have the right to counsel, who has “an obligation to investigate [the matter] and advise the client.” Defendants have the right to all “exculpatory material” in the government’s possession. In addition, actions leading to procedural

\[\text{Id. at 266.}\]
\[\text{Id. at 226.}\]
\[\text{Confrontation, Equity, and the Misnamed Exception, supra note 141, at 1226.}\]
\[\text{See, e.g., Mary Sue Backus & Paul Marcus, The Right to Counsel in Criminal Cases, A National Crisis, 57 Hastings L.J. 1031, 1080–81 (2006) (pointing to the “challenges facing [public] defenders, including overwhelming caseloads, lack of supervision and training, inadequate compensation and resources, and political pressure”).}\]
\[\text{Id. at 1227.}\]
\[\text{Spritzer, supra note 163, at 475.}\]
\[\text{Confrontation, Equity, and the Misnamed Exception, supra note 141, at 1227.}\]
\[\text{Id.}\]
\[\text{Id. at 1227.}\]
\[\text{Id.}\]
\[\text{Id.}\]
default, such as failure to object, frequently occur during trial, which means that a judge or other judicial figure is overseeing the proceedings, thereby providing supervision and possibly aid and advice.\textsuperscript{197}

Significant discrepancies become apparent by comparing the type of “forfeiture” applied in \textit{Giles} to the “forfeiture” doctrine of other constitutional rights. “Forfeiture” as defined in \textit{Giles} means that a person forfeits his or her right to confront the witnesses against him or her due to the same wrongdoing for which he or she will stand trial.\textsuperscript{198} Under \textit{Giles}, defendants sometimes forfeit rights because of pre-indictment, pre-arrest, and pre-investigation behavior alone.\textsuperscript{199} At that stage, defendants do not have counsel, exculpatory evidence, or the supervision of the judiciary to aid and advise him of his decision.\textsuperscript{200} Not all of the safeguards in place for pleas of guilty and procedural default forfeitures are present under the forfeiture by wrongdoing exception.\textsuperscript{201}

The defendant in \textit{Giles} was not under arrest, did not have any counsel present, was not under the supervision of the court, and did not even know he was under investigation at the time that he “forfeited” his Sixth Amendment constitutional right.\textsuperscript{202} The plurality and dissent in \textit{Giles} based their entire arguments on the correct meanings and usages of “means or procurement” and other key words.\textsuperscript{203} The justices agreed that correct word choice and precision in defining those words are integral components in determining the law, especially in Sixth Amendment jurisprudence.\textsuperscript{204} However, if the choice of words and their meanings are so important to the Court, then where does the plurality’s interpretation of the forfeiture by wrongdoing exception come from? It certainly does not fit within “forfeiture” jurisprudence as defined by the Court over the years.\textsuperscript{205} However, if one applied the forfeiture by wrongdoing exception to post-indictment, post-investigation, or post-arrest wrongdoing, then it fits


\textsuperscript{198} \textit{Giles}, 128 S. Ct. at 2682.

\textsuperscript{199} See id. at 2681.

\textsuperscript{200} See id.

\textsuperscript{201} \textit{Confrontation, Equity, and the Misnamed Exception}, supra note 141, at 1225–26, 1228.

\textsuperscript{202} See \textit{Giles}, 128 S. Ct. at 2681.

\textsuperscript{203} \textit{Id.} at 2683–84 (plurality), 2696–97 (Breyer, J., dissenting).

\textsuperscript{204} \textit{Id.} at 2682–85 (plurality opinion) (supporting an originalist approach to Confrontation Clause jurisprudence).

\textsuperscript{205} See discussion supra Part IV.A.
squarely with the other forms of “forfeiture” because all the safeguards placed on forfeiting constitutional rights are present. Defendants would have knowledge of their right of confrontation, the advice of counsel, and available exculpatory evidence.\textsuperscript{206} If the Court were to place a temporal limitation on when forfeiture by wrongdoing can occur, the exception would comport with the rest of the “forfeiture” jurisprudence.

\textbf{B. Please Sign Here and Waive(r) Goodbye to Your Rights}

“Waiver” requires that defendants know of the nature of their constitutional rights and that they “intentionally relinquish” the right’s protection.\textsuperscript{207} Before states can permanently strip defendants of their constitutional rights and defenses, they must show that the defendant “made a deliberate decision to forgo these defenses, [and] that [the defendant] made the decision after being fully apprised of the consequences and alternatives . . .”.\textsuperscript{208} In other words, “the waiver standard looks to the defendant’s knowledge of the right as well as the deliberate intention to relinquish that right.”\textsuperscript{209} A common method of waiving constitutional rights is through signing a waiver, which is deemed an intelligent and knowing waiver of rights.\textsuperscript{210}

The Court has “consistently emphasized that Sixth Amendment rights are special, which implies additional protections to protect against loss.”\textsuperscript{211} For example, the defendants’ waiver of the Sixth Amendment right to counsel must be “intelligent and knowing.”\textsuperscript{212} They must intelligently waive the right to a trial by jury, another Sixth Amendment guarantee.\textsuperscript{213} Further, defendants may waive the right to be present during their own

\begin{footnotesize}
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\item[208] Westen, supra note 163, at 1214.
\item[209] Confrontation, Equity, and the Misnamed Exception, supra note 141, at 1200.
\item[211] Confrontation, Equity, and the Misnamed Exception, supra note 141, at 1225.
\item[213] See Faretta v. California, 422 U.S. 806, 814 (1975) (holding a defendant, “in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury”).
\end{itemize}
\end{footnotesize}
trial, but only if they understand that their acts have the effect of waiving that right.\footnote{214}{Illinois v. Allen, 397 U.S. 337, 345–46 (1970) (stating that the defendant, after being warned several times and still continuing his disruptive and contumacious behavior, could be removed from the courtroom without violating his Sixth Amendment right to be present during his trial).}

The forfeiture by wrongdoing exception, as announced in \textit{Giles}, operates in a fashion completely opposite of the traditional “waiver” standards.\footnote{215}{See discussion \textit{supra} Part IV.B.} In effect, it allows defendants to lose their Sixth Amendment right to confrontation without ever knowing that they had such a right in the first place. Under \textit{Giles}, defendants lose their right to confront those witnesses against them due to actions taken prior to indictment, investigation, and arrest.\footnote{216}{See \textit{Giles v. California}, 128 S. Ct. 2678, 2693 (2008) (concluding that a defendant’s purpose of preventing the victim from appearing as a witness is alone sufficient to relinquish confrontation clause rights).} In most situations, defendants will not be educated as to their rights, when they attach, and how they are lost.\footnote{217}{See Ursula Odiaga, \textit{The Ethics of Judicial Discretion in Plea Bargaining}, 2 GEO. J. LEGAL ETHICS 695, 703 (1988-1989) (explaining that criminal defendants are ignorant of their rights and need criminal defense attorneys so they can understand how those rights apply in their case).} It is very unlikely that accused criminals know the nature of their constitutional right of confrontation before they engage in criminal activity.\footnote{218}{See Michael Abramowicz, \textit{Constitutional Circularity}, 49 UCLA L. REV. 1, 44 (2001) (relying on \textit{Miranda v. Arizona}, 384 U.S. 436, 469 (1966) for the broad proposition that inferences regarding a defendant’s knowledge of his or her constitutional rights “can never be more than speculation”).} If they do not understand the nature of the right, then it is also impossible to decide to waive its protection intelligently and knowingly.

To have a valid constitutional waiver, defendants must understand the nature of their rights and intelligently and knowingly waive those rights.\footnote{219}{See \textit{Johnson v. Zerbst}, 304 U.S. 458, 464 (1938).} However, \textit{Giles} declared and approved the opposite—an unintelligent and unknowing relinquishment of a constitutional right.\footnote{220}{See \textit{Giles v. California}, 128 S. Ct. 2678, 2693 (2008).} It is illogical to say that people can intentionally and intelligently waive a constitutional right when they have not been arrested and not been privy to advice by counsel or a judge. Nor is there any reason to assume that most criminal defendants have prior knowledge of their rights before being indicted,
investigated, or arrested. Further, courts are supposed to “indulge every reasonable presumption against waiver of fundamental constitutional rights.”

Taking all of this together, it is extremely odd that the Court is willing to let someone waive the constitutional right to confrontation without the defendant ever knowing about the right in the first place.

C. Forfeiture, Waiver, and Forfeiture by Wrongdoing—Which One of These Things Is Not Like the Other?

As evidenced above, both the law of forfeiture and the law of waiver are irreconcilable with the redefined forfeiture by wrongdoing exception. The holding in Giles appears to be an anomaly within the realm of constitutional rights jurisprudence. The plurality seems to have created a brand new category of ways to relinquish constitutional rights. The forfeiture by wrongdoing exception allows defendants to lose the constitutional right to confrontation without any safeguards or knowledge of the right lost, without any advice of counsel, without any guidance from a judicial body, and without ever knowing that they had such a right. It is strange that an opinion dedicated almost entirely to history and to ensuring that our current precedents reflect those of our ancestors would create a brand new method of losing constitutional rights. This problem would not exist if the forfeiture by wrongdoing exception was limited to events occurring after indictment, investigation, or arrest. Once arrested, defendants have the right to advice from counsel, which includes an explanation of their constitutional rights. The accused is also subject to the oversight of the presiding judge and receives any exculpatory evidence in the hands of the government. Only once the accused receives the protection of safeguards, such as the ones mandated by forfeiture and

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221 See Abramowicz, supra note 218, at 44.
222 Johnson, 304 U.S. at 464.
223 See discussion supra Part IV.
224 See Giles, 128 S. Ct. at 2693 (remanding the case to California state court with the implication that, if the defendant committed the crime with the intent of preventing the victim from testifying, then the defendant waived his right to confront the witness at the moment he committed the crime).
225 See id. at 2683–86 (citing several cases from the time of the founding to determine the historical roots of the forfeiture by wrongdoing doctrine).
226 See id. at 2687–88 (citing several modern cases to prove that current precedents follow the same pattern as the historical cases).
228 See Confrontation, Equity, and the Misnamed Exception, supra note 141, at 1226.
waiver law, can the defendant effectively relinquish the right to confrontation as guaranteed by the Constitution, something that the Court has apparently forgotten.

V. CONCLUDING REMARKS AND ANOTHER LOOK AT ORIGINALISM

The plurality in Giles misconstrued and misapplied the forfeiture by wrongdoing exception in its entirety. By allowing the exception to apply to pre-indictment, pre-investigation, and pre-arrest behavior, the plurality failed to adhere to an inherent time limitation found within the exception. This limitation is self-evident when its heritage is traced back to the English common law, as well as the early American cases regarding the exception. It is also apparent when after examining Federal Rule of Evidence 804(b)(6), which is a codification of the exception. The exception is also incompatible with case law regarding the forfeiture or waiver of constitutional rights.

On a final note, the problem with the Court’s differing interpretations of the forfeiture by wrongdoing exception is attributable to the problems associated with an originalist approach. When the Court attempts to create modern law from law created centuries ago, there will always be considerations and concerns lost through the ages. The law is not static in nature, and neither are its principles, yet an originalist will “attribute a fixed content to the original meaning.” Because originalism declares a

\[229\]  \textit{Id.} at 1225 (“The general mode of analysis for the formal loss of the right of confrontation always has been framed as a waiver, requiring proof of knowledge and intent to relinquish the right, or sufficient facts that, in context, support an implied waiver of the right.”).

\[230\]  See \textit{Giles}, 128 S. Ct. at 2682. Justice Scalia characterized the California court of appeal’s theory of the case: “Giles had forfeited his right to confront Avie because he had committed the murder for which he was on trial, and because his intentional criminal act made Avie unavailable to testify.” \textit{Id.} at 2682. Without addressing the time limitation, the plurality opinion concluded that the California court erred by believing that intent was irrelevant. \textit{See id.} at 2693.

\[231\]  See discussion supra Part II.A.

\[232\]  See discussion supra Part III.

\[233\]  See discussion supra Part IV.

\[234\]  See \textit{Giles}, 128 S. Ct. at 2694 (Souter, J., concurring) (“The contrast between the Court's and Justice Breyer’s careful examinations of the historical record tells me that the early cases on the exception were not calibrated finely enough to answer the narrow question here.”).

fixed and static meaning to a legal term, it essentially determines that all information attained after the founding is inherently valueless. 236 Therefore, it is one of the only techniques by which judges can completely eliminate new or recent legal developments without violating the principle of *stare decisis*. 237 By finding some historical support for a proposition, the Court can erase years of precedent because, to an originalist, the original meaning trumps all other law. 238

In the early years of jurisprudence, this country believed that slavery was proper, that slaves were an inferior type of person, and that they could never be citizens of this country. 239 The United States borrowed the practice of slavery from England, as well as the law that protected it. 240 however, wisdom and developments within the legal community and society have since proven it wrong. Ask anyone today whether the *Dred Scott v. Sandford* decision was correct and the answer will be a deafening “No!” If this originalist idea is no longer valid, who is to pick and choose the ones that are? It seems as if originalism has become a tool for judges to overturn entire doctrines better to fit their own ideological concerns. 242

Regardless of the problems and concerns associated with an originalist approach, the Court in *Giles* took an exception to the Sixth Amendment and applied it to situations in which it was never intended—to pre-arrest, pre-investigation, and pre-indictment conduct. 243 The weight of authority found in English common law, early American case law, discussions and comments surrounding Federal Rule of Evidence 804(b)(6), and an analysis of forfeiture and waiver law, all point decidedly in favor of placing a time limitation on the application of the exception. As such, the forfeiture by wrongdoing exception should only apply to situations

236 See *id.* at 572 (“[B]ecause originalism posits a fixed original meaning, originalism uniquely can seem to justify wiping out recent legal developments in order to return to the purportedly fixed original meaning.”) (emphasis removed).

237 *Id.*

238 *Id.*


240 See *id.* at 477–78.

241 60 U.S. 393 (1856).

242 See, e.g., Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAw & SOC'y REV. 113, 133 (2002) (“Justices might speak about following an ‘originalist’ jurisprudence, but they only appear to do so when arguments about text and intent coincide with the ideological position that they prefer.”).

involving intentional and voluntary wrongdoing by the accused after he or she has been indicted, placed under investigation, or arrested.