BEGUILED BY *GILES*: THE OVERLOOKED DUALITY OF FORFEITURE BY WRONGDOING

ABSTRACT

In Giles v. California,[1] *the Supreme Court announced an intent requirement for the forfeiture by wrongdoing exception to the Sixth Amendment's Confrontation Clause. In doing so, the Court referenced a corresponding exception to the hearsay rule,*[2] *but did not explicitly address the level of continuity, or discontinuity, between these two parallel exceptions. While the Court's language could be taken to imply that the analysis should be the same in either case, this Note contends that a distinction between the two exceptions can, and should, be recognized.*

1. Giles v. California, 554 U.S. 353 (2008).
2. FED. R. EVID. 804(b)(6) (providing that the hearsay rule does not exclude "statement[s] 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").

A BRIEF OVERVIEW

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[3] Incorporated against the states via the Fourteenth Amendment in 1965,[4] the Confrontation Clause affords a right to defendants in both federal and state criminal prosecutions. Recently, the United States Supreme Court breathed new life into this "bedrock procedural guarantee"[5] by instituting a new paradigm for Confrontation Clause analysis. In *Crawford v. Washington*, the Court replaced the former "indicia of reliability" test[6] with a requirement that all "testimonial" statements offered against criminal defendants be subject to cross-examination.[7] *Crawford*'s impact on criminal trials was instantly transformative, but the guidance it provided was far from comprehensive.[8] Many questions were left unanswered, some of which have since been addressed by *Crawford*'s progeny: *Davis v. Washington*,[9] *Giles v. California*,[10] and *Melendez-Diaz v. Massachusetts*,[11] and *Michigan v. Bryant*.[12]

One of the areas left largely unexplored by *Crawford* concerns the existence of possible exceptions to the general ban on unconfronted testimonial statements. The Court in *Crawford* observed in passing that "dying declarations" had historically been considered an exception to the rule, but it determined that it "need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations."[13] The Court did, however, infer its acceptance of "the rule of forfeiture by wrongdoing," noting that it "extinguishes confrontation claims on essentially equitable grounds."[14] Despite this acknowledgement, the Court declined to elaborate on the doctrine's application in the context of

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3. U.S. CONST. amend. VI.

4. Pointer v. Texas, 380 U.S. 400, 406 (1965) ("We hold that . . . the confrontation guarantee of the Sixth Amendment . . . like the right against compelled self-incrimination, is 'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'") (quoting Malloy v. Hogan, 378 U.S. 1, 10 (1964)).

5. Crawford v. Washington, 541 U.S. 36, 42 (2004).

6. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980) (finding sufficient "indicia of reliability" where the testimony either falls within one of the established hearsay exceptions or possesses other "particularized guarantees of trustworthiness"), *abrogated by Crawford*, 541 U.S. 36.

7. *Crawford*, 541 U.S. at 68–69.

8. *The Supreme Court, 2007 Term--Leading Cases*, 122 HARV. L. REV. 276, 336–37 (2008) (noting that the Court "transformed the face of constitutional evidence law," yet "provided precious little elaboration on what statements should be considered 'testimonial' or whether there were any exceptions to the requirement of confrontation").

9. 547 U.S. 813 (2006).

10. 554 U.S. 353 (2008).

11. 129 S. Ct. 2527 (2009).

12. 131 S. Ct. 1143 (2011).

13. *Crawford*, 541 U.S. at 56 n.6.

14. *Id.* at 62 (citing Reynolds v. United States, 98 U.S. 145, 158–59 (1879)).

the Confrontation Clause. In *Davis v. Washington*, the Court reiterated these same statements from *Crawford* and further declared that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation."[15] The Court took pains to point out that it was "tak[ing] no position on the standards necessary to demonstrate such forfeiture," despite going on to discuss the "preponderance-of-the-evidence standard" generally used by the federal courts in cases dealing with Federal Rule of Evidence 804(b)(6),[16] a rule it described as "codif[ying] the forfeiture doctrine."[17]

More detailed guidelines concerning the doctrine of forfeiture by wrongdoing were finally announced in *Giles v. California*, where the Court announced the specific intent requirement necessary to demonstrate forfeiture by wrongdoing for the purpose of the Confrontation Clause.[18] It reaffirmed the statement that Federal Rule of Evidence 804(b)(6) "codifies the forfeiture doctrine"[19] but did not elaborate on the level of continuity between the doctrine as it applies to the Confrontation Clause and the doctrine as codified in Federal Rule of Evidence 804(b)(6). This paper contends that despite the language used by the court in *Davis* and *Giles*, a distinction can, and should, be maintained between the forfeiture by wrongdoing rule as applied in the distinct contexts of the Confrontation Clause and the hearsay rule. Part I of the paper supplies background information regarding the adoption of the hearsay rule exception and summarizes the Court's decision in *Giles*. Part II presents arguments for making a distinction between the exceptions, and Part III discusses the practical distinctions likely to arise, particularly with regard to the level of proof necessary to invoke the exception. Conclusions are presented in Part IV.

I: BACKGROUND

A. The Hearsay Exception: Rule 804(b)(6)

The forfeiture by wrongdoing rule, Federal Rule of Evidence 804(b)(6), is a relatively new addition to the Federal Rules of Evidence.[20] The rule excludes from hearsay "statement[s] 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."[21] Despite its recent vintage, however, the doctrine itself is not novel, nor is its recogni-

15. *Davis*, 547 U.S. at 833.
16. *Id.* (citing United States v. Scott, 284 F.3d 758, 762 (7th Cir. 2002)).
17. *Davis*, 547 U.S. at 833.
18. Giles v. California, 554 U.S. 353, 367 (2008).
19. *Id.*
20. FED. R. EVID. 804(b)(6) was part of the 1997 amendments to the rules. *See* FED. R. EVID. 804(b)(6) advisory committee's note.
21. FED. R. EVID. 804(b)(6).

tion in the federal courts; every circuit to have addressed the question had previously adopted some form of the doctrine.[22] Without its own standalone rule, forfeiture by wrongdoing existed as a familiar rationale for invoking the "residual exception" rule.[23] Its recognition as a basis for using the residual exception was universally acknowledged, [24] but the standards of proof for determining forfeiture varied between the circuits. Several had adopted a preponderance of the evidence standard,[25] while a minority held to a "clear and convincing" requirement.[26] In the '70s, '80s, and '90s, the increasing prevalence of witness intimidation in high-profile criminal cases gave rise to a search for tools to combat its growing threat.[27] As part of this movement, it was proposed that forfeiture by wrongdoing be added to the Federal Rules of Evidence as a distinct exception to the general ban on hearsay, with the requirements for its invocation uniformly relaxed.[28]

In 1995, an amendment to the Federal Rules of Evidence, entitled "waiver by misconduct" was approved for publication.[29] After receiving comments on the proposed rule, two changes were made. First, the title was altered to *forfeiture* instead of *waiver* to reflect the rationale for the

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22. FED. R. EVID. 804(b)(6) advisory committee's note ("Every circuit that has resolved the question has recognized the principle of forfeiture by misconduct, although the tests for determining whether there is a forfeiture have varied.").

23. At the time, the residual exception was codified at Federal Rules of Evidence 803(24) and 805(b)(5); the 1997 amendment consolidated these two rules and transferred them to the new residual exception rule, Rule 807. *See* FED. R. EVID. 804(b)(6) advisory committee's notes. FED. R. EVID. 807 provides:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

24. *See* United States v. Zlagotur, 271 F.3d 1025, 1028 (11th Cir. 2001) ("[T]he doctrine of waiver by misconduct was widely adopted and permitted the admission of hearsay under the residual exception to the hearsay rule.").

25. *See, e.g.*, United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992); Steele v. Taylor, 684 F.2d 1193, 1202 (6th Cir. 1982); United States v. Carlson, 547 F.2d 1346, 1358–59 (8th Cir. 1976); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979).

26. *See, e.g.*, United States v. Thevis, 665 F.2d 616, 631 (5th Cir. 1982).

27. *See* Leonard Birdsong, *The Exclusion of Hearsay Through Forfeiture by Wrongdoing—Old Wine in a New Bottle—Solving the Mystery of the Codification of the Concept into Federal Rule 804(b)(6)*, 80 NEB. L. REV. 891, 908 (2001).

28. *See id.* at 906–08.

29. *See* James F. Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems with Federal Rule of Evidence 804(B)(6)*, 51 DRAKE L. REV. 459, 478 (2003) (citing Minutes of the Advisory Committee on Federal Rules of Evidence (Apr. 5, 1996)).

rule more accurately.[30] While waiver implies voluntary relinquishment, forfeiture operates "regardless of the defendant's knowledge" and irrespective of the defendant's intent.[31] Second, "the committee changed the language from 'a party *who* has engaged or acquiesced in wrongdoing,' to 'a party *that* has engaged or acquiesced in wrongdoing' to make clear that the rule applied to the government."[32] Several other changes were considered, including a proposal to refer specifically to witness tampering in the language of the rule.[33] The committee ultimately rejected this suggestion, believing that the rule as it stood was sufficiently specific in this regard.[34] The committee notes stress that the very purpose for its codification was the need for a "prophylactic rule to deal with abhorrent behavior," specifically witness tampering, a problem "'which strikes at the heart of the system of justice itself.'"[35]

The new hearsay exception incorporated the preponderance standard of Federal Rule of Evidence 104(a), ending the split which had previously existed between the circuits. The adoption of the more relaxed of the standards was calculated to more effectively discourage the "abhorrent behavior" of witness intimidation.[36] In 1997 the amendment made its way through the approval process and was ultimately adopted as Federal Rule of Evidence 804(b)(6).[37] Despite giving its approval of the rule prior to its enactment, the Supreme Court was silent as to its interpretation for the next decade. In the years between the adoption of Federal Rule of Evidence 804(b)(6) and the recent string of Confrontation Clause cases, the Supreme Court never weighed in on the rule itself; the first time Federal Rule of Evidence 804(b)(6) appears in a Supreme Court decision is the passing reference it received in *Davis v. Washington*.[38]

B. The Confrontation Clause Exception: Giles v. California

In September 2002, Dwayne Giles shot and killed his girlfriend, Brenda Avie.[39] The two were alone outside the garage of Giles's grandmother's house. The fatal shots were heard by Giles's niece from within the house,

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30. *See id.*
31. Tim Donaldson, *Combating Victim/Witness Intimidation in Family Violence Cases: A Response to Critics of the "Forfeiture By Wrongdoing" Confrontation Exception Resurrected by the Supreme Court in* Crawford *and* Davis, 44 IDAHO L. REV. 643, 662 (2008).
32. *See* Flanagan, *supra* note 29, at 479 (citing Minutes of the Advisory Committee on Federal Rules of Evidence (Apr. 22, 1996)).
33. *Id.*
34. *Id.*
35. FED. R. EVID. 804(b)(6) advisory committee's note (quoting United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982).
36. *See id.*
37. Giles v. California, 554 U.S. 353, 367–68 (2008).
38. Davis v. Washington, 547 U.S. 813, 833 (2006).
39. *Giles*, 554 U.S. at 356.

but no one witnessed the shooting itself. Giles ran away immediately after the shooting and managed to evade the police for two weeks before finally being apprehended and charged with Avie's murder.[40]

Giles testified at his trial that Avie was jealous of his new girlfriend, and on the day of the killing, Avie had threatened over the phone to kill her. Giles claimed that Avie had a violent history, having once shot a man, threatened people with a knife, and vandalized Giles's home and car. She arrived at his grandmother's house renewing her threats to kill Giles's new girlfriend and threatened to kill Giles as well. Giles claimed that he feared for his safety and retrieved a gun stored under a couch in the garage. He claimed that he fired only after Avie charged at him, believing that she "had something in her hand."[41] According to Giles, he simply closed his eyes and fired several shots in self-defense, not intending to kill Avie.[42] She was struck six times and died at the scene.

About three weeks prior to the killing, Avie had reported an incident of domestic violence to the police. She told the responding police officer that Giles had accused her of having an affair and that he had grabbed her, lifted her off the floor, and choked her. Avie claimed that he punched her after she broke away from his grip, and after breaking away yet again, he opened a folding knife and threatened to kill her if he found her cheating on him. Avie's recounting of these events to the police was offered at Giles's trial by the prosecution and admitted into evidence over Giles's objection. Giles was convicted by the jury of first-degree murder.[43]

On appeal, Giles contended that the admission of Avie's unconfronted statements violated his rights under the Confrontation Clause.[44] The California Court of Appeal held that Giles had forfeited his right of confrontation by murdering Avie.[45] It found that the forfeiture doctrine did not require the specific intent to procure the unavailability of a witness, but merely the intent to commit an act which resulted in that unavailability.[46] The California Supreme Court affirmed on the same grounds.[47]

On writ of certiorari to the United States Supreme Court, the judgment of the California court was vacated and remanded.[48] In his opinion for a narrow majority, Justice Scalia explained that the forfeiture by wrongdoing exception to the Confrontation Clause requires the specific design or

40. *Id.*
41. *Id.*
42. *Id.* While Giles claimed that Avie's death was not intended, he stipulated that he had fired the shots and that they were the cause of Avie's death. *Id.*
43. *Id.* at 356–57.
44. *See* People v. Giles, 19 Cal. Rptr. 3d 843, 845 (Cal. Ct. App. 2004).
45. *Id.*
46. *See id.* at 847.
47. People v. Giles, 152 P.3d 433, 435 (Cal. 2007).
48. *Giles*, 554 U.S. at 377.

purpose to prevent a witness's testimony.[49] A survey of historical cases and treatises indicated that the doctrine, as it existed at the founding, applied only when a witness "was 'detained' or 'kept away' by 'means or procurement' of the defendant."[50] The Confrontation Clause admits only those exceptions which were recognized at the time of the founding;[51] thus, because the California Supreme Court's articulation of forfeiture by wrongdoing was "unheard of at the time of the founding or for 200 years thereafter," its judgment was due to be reversed.[52]

II: TWO SIMILAR, BUT DIFFERENT EXCEPTIONS

The fact that the hearsay rule and the Confrontation Clause each entertain exceptions for forfeiture by wrongdoing should come as no surprise, since "the two bodies of law . . . husband essentially the same interests."[53] Indeed, the Court in *Giles* noted that the present day distinction between the two bodies of law would have been unrecognizable to the founders, "because courts prior to the founding excluded hearsay evidence in large part *because* it was unconfronted."[54] *Giles* reaffirmed the Court's previous observation that "'[i]t seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots.'"[55]

Notwithstanding their common origin, some general distinctions between the Confrontation Clause and the hearsay rules have been maintained ever since the Constitution was written.[56] Despite "stem[ming] from the same roots,"[57] the branches into which they have developed "are not coterminous."[58] The exact relationship between the two is less than clear; while they doubtless share a substantial portion of overlapping conceptual territory, "[t]he Supreme Court has yet to plot the crossroads at which the

49. *Id.* at 359–60.

50. *Id.* at 359.

51. *See* Crawford v. Washington, 541 U.S. 36, 54 (2004) ("[The Confrontation Clause] is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.") (quoting Mattox v. United States, 156 U.S. 237, 243 (1895)).

52. *Giles*, 554 U.S. at 377.

53. United States v. Houlihan, 92 F.3d 1271, 1281 (1st Cir. 1996).

54. *Giles*, 554 U.S. at 365 (citing 2 WILLIAM HAWKINS, PLEAS OF THE CROWN 606 (6th ed. 1787); 2 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 313 (1736)).

55. *Giles*, 554 U.S. at 365 (quoting Dutton v. Evans, 400 U.S. 74, 86 (1970)).

56. California v. Green, 399 U.S. 149, 155 (1970) ("While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete . . . . Our decisions have never established such a congruence . . . .").

57. *Giles*, 554 U.S. at 365 (quoting Dutton v. Evans, 400 U.S. 74, 86 (1970)).

58. *Houlihan*, 92 F.3d at 1281 (citing *Green*, 399 U.S. at 155–56). *See also* United States v. Shaw, 69 F.3d 1249, 1253 (4th Cir. 1995) ("[T]he various exceptions to the evidentiary rule and the constitutional stricture [of the Confrontation Clause] are not necessarily coterminous.") (citing Idaho v. Wright, 497 U.S. 805, 814 (1990)).

Confrontation Clause and the hearsay principles embedded in the Evidence Rules intersect."[59] As recently as the Court's opinion in *Michigan v. Bryant* it has been acknowledged that "the scope of the exemption from confrontation and that of the hearsay exceptions also are not always coextensive."[60]

As a result of this distinction between the two bodies of law, it is possible for the Confrontation Clause to prohibit what would otherwise be allowed by a hearsay exception.[61] Additionally, "[t]he converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied."[62] It follows then that forfeiture by wrongdoing might preclude an objection under the hearsay rule, and yet not effect a forfeiture of confrontation rights; it might equally be possible for a defendant's confrontation rights to be forfeited while not surrendering a hearsay objection.[63] Unless the Supreme Court determines that the Confrontation Clause and the hearsay rule "intersect" at the forfeiture by wrongdoing doctrine so as to nullify any distinction between them for the purposes of forfeiture analysis, the two should be approached as distinct entities. Even if the Court were to declare the exception to be substantively identical in either context, other considerations would likely still dictate a difference in application. As it is, there is substantial reason to doubt their congruity. The Court's statement that Federal Rule of Evidence 804(b)(6) "codifies the forfeiture doctrine"[64] should not be taken to mean that the application of forfeiture by wrongdoing is necessarily identical for both the hearsay rule and the Confrontation Clause. The rule itself, other clues regarding its treatment in *Davis* and *Giles*, and the application of *Giles* by other courts all indicate that a distinction ought to be recognized.

A. Difference Recognized in the Rule Itself

The most obvious difference in the rule itself concerns its scope of applicability. The Confrontation Clause, by its terms, applies to "all criminal prosecutions."[65] At the founding, the doctrine was applicable only against

59. *Houlihan,* 92 F.3d at 1281.
60. Michigan v. Bryant, 131 S. Ct. 1143, 1175 (2011) (Scalia, J., dissenting).
61. *Green*, 399 U.S. at 155–56 (citing Barber v. Page, 390 U.S. 719 (1968)).
62. *Green*, 399 U.S. at 156 (citing *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 236 (1968); Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434, 1436 (1966)).
63. *See Houlihan*, 92 F.3d at 1281 ("[W]hether hearsay principles are more or less protective of a defendant's right to cross-examination than confrontation principles depends on the point at which the balance is struck in any particular instance . . . .") (citing *Green*, 399 U.S. at 156).
64. Davis v. Washington, 547 U.S. 813, 833 (2006).
65. U.S. CONST. amend. VI. Although the word "all" gained greater significance through the enlarging of the Amendment's scope via the Fourteenth Amendment, it still applies only to criminal prosecutions.

criminal defendants. The hearsay rules, on the other hand, expand the doctrine's application to civil actions, as well as admiralty, maritime, contempt, and bankruptcy proceedings.[66] This is not to say that the rule, as expressed in 804(b)(6), could not have substantially codified the common law doctrine as it existed at the founding; but it certainly did not do so in all respects. At the very least, the scope of the rule's application greatly exceeds the scope of the common law doctrine; it did not simply codify the doctrine's original scope.[67]

Not only has the scope of cases in which the rule applies been expanded, so has the type of statements which fall under the exclusion. Here, as well, the claim that Federal Rule of Evidence 804(b)(6) has "codifie[d] the forfeiture doctrine"[68] as it existed at the founding simply does not bear out under a literal interpretation. "In framing-era law, forfeiture applied only to the sworn testimony that a witness who was kept away from trial by the defendant had previously given under the Marian statutes."[69] In contrast, Federal Rule of Evidence 804(b)(6) "plainly permits the admission of unsworn and unconfronted hearsay statements" which would have been excluded at the founding.[70] Clearly, the Court did not intend to assert that the exception in Federal Rule of Evidence 804(b)(6) represents an exact replication of the founding-era right.

In addition, the Advisory Committee Notes provide no support for this "mere codification" view. No mention is made of the historical practice or traditional standards for the forfeiture by wrongdoing rule, nor is the Confrontation Clause ever referenced.[71] To the contrary, the impetus for the rule's enactment was an expedient solution to a modern problem. Likewise, the standard for determining forfeiture was specifically implemented in response to the contemporary circumstances—the rise in instances of witness intimidation—which motivated the Rule's adoption. The Committee Notes specifically state that the preponderance of the evidence standard has been adopted "in light of the behavior *the new Rule* 804(b)(6) seeks to discourage."[72]

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66. FED. R. EVID. 1101(b) ("These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.").

67. *See* Flanagan, *supra* note 29, at 462 ("[T]he exception was aimed at the conduct of criminal defendants with little thought to other applications, but it also reaches the prosecution, as well as civil litigants, creating the possibility for unintended consequences.").

68. *Davis*, 547 U.S. at 833.

69. Thomas Y. Davies, *Selective Originalism: Sorting out Which Aspects of* Giles*'s Forfeiture Exception to Confrontation Were or Were Not "Established at the Time of the Founding*," 13 LEWIS & CLARK L. REV. 605, 605 (2009).

70. *Id.* at 610.

71. *See* FED. R. EVID. 804(b)(6) advisory committee's notes.

72. *Id.* (emphasis added).

B. Differences Inferred from the Context of the Court's Comparison

The context in which the Supreme Court has referred to Federal Rule of Evidence 804(b)(6) also indicates that an expansive, literal claim of codification was not intended. In *Davis*, the Court discusses Federal Rule of Evidence 804(b)(6) in a paragraph dealing with the standards for demonstrating forfeiture. While the Court purported not to take a position on the issue, the statement that 804(b)(6) "codifies the forfeiture doctrine" appears for the first time as an invitation for the lower courts to consider, for the sake of argument, the practical effect of the 804(b)(6) propensity standard.[73] As noted in the paragraph above, the adoption of the propensity standard was not motivated by consistency with historic precedent. Rather than making a claim about the historical validity of 804(b)(6), the thrust of the *Davis* Court's argument seems to be that the standards for demonstrating forfeiture—whatever they are—will not tie the hands of the judges applying the rule.[74] The purpose seems to be to allay concerns about the rule's operation under *Crawford*, and reassure courts that the "ability . . . to protect the integrity of their proceedings"[75] would still be comparable to that under the "indicia of reliability"[76] paradigm recognized in *Roberts*.

In *Giles*, where the Court *did* take a position on the standard for determining forfeiture, the reference to Federal Rule of Evidence 804(b)(6) appears in Part II.C of the majority opinion, a section in which the Court bolstered its pre-founding historical argument by discussing the cases dealing with the doctrine following the founding.[77] The Court first discussed *Reynolds v. United States*, the first Supreme Court case to grapple with the forfeiture doctrine.[78] It found that *Reynolds* did nothing to alter the pre-founding requirement of intent to procure a witness' unavailability; to the contrary, it was "'content with' the 'long-established usage' of the forfeiture principle."[79] The Court concluded that until 1985, the forfeiture doctrine was never invoked outside the context of deliberate witness tampering. Only then did the Court invoke Federal Rule of Evidence 804(b)(6), as evidence that, even after 1985, the prevailing view remained as it had previously—that "the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable."[80] In this con-

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73. *See* Davis, 547 U.S. at 833.
74. *See id.* at 833–34 (discussing the propensity standard in order to emphasize that "*Crawford*, in overruling *Roberts*, did not destroy the ability of courts to protect the integrity of their proceedings").
75. *Id.* at 834; *see* Giles v. California, 554 U.S. 353, 374 (2008).
76. Ohio v. Roberts, 448 U.S. 56, 66 (1980).
77. *Giles*, 554 U.S. at 366.
78. Reynolds v. United States, 98 U.S.145 (1878).
79. *Giles*, 554 U.S. at 366 (quoting *Reynolds*, 98 U.S. at 158–59).
80. *Id.* (quoting 5 C. MUELLER & L. KIRKPATRICK, FEDERAL EVIDENCE 235 (3d ed. 2007)).

text, the statement that 804(b)(6) "codifies the forfeiture doctrine" merely acknowledges the fact that the "intent" element in 804(b)(6) is consistent with the original formulation of the forfeiture doctrine; it leaves open the possibility of differences between the exceptions in other respects.[81]

The fact that the Court in *Giles* did not consider the hearsay exception and the confrontation exception to be a single unit is evidenced elsewhere in the opinion as well. In its response to the dissent's objection to the effect of the forfeiture by wrongdoing exception as it relates to domestic violence situations, the Court stated that the "hearsay rules . . . are free to adopt the dissent's version of forfeiture by wrongdoing."[82] Despite noting the similarities between the hearsay exception and the traditional common law doctrine, the Court here seems to indicate a respect for the continued development of each as distinct bodies of law.

C. The Potential for Differences Recognized by Other Courts

The opening left by the Court in this area has been recognized in at least one of the federal circuits. No court thus far has had to make a determination of this issue, but the Eighth Circuit in *United States v. Wright* observed that "the common law exception at issue in *Giles* is not necessarily co-extensive with the forfeiture-by-wrongdoing hearsay exception codified in Rule 804(b)(6)."[83] Before the *Giles* decision, but after *Davis*, the Eighth Circuit in *United States v. Johnson* observed that "the scope of the forfeiture by wrongdoing doctrine under common law *may differ* from the version of the doctrine established by Rule 804(b)(6)."[84] This view was tacitly acknowledged by the Sixth Circuit even before *Davis* as well.[85]

The Supreme Court itself once observed with regard to the Confrontation Clause and hearsay rules that it is one thing to identify individual points of overlap, and "quite a different thing to suggest that the overlap is complete."[86] In the absence of a decision by the Court actually declaring the Confrontation Clause and hearsay exceptions to be congruent in every

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81. *Id.* (quoting Davis v. Washington, 547 U.S. 813, 833 (2006)).

82. *Giles*, 554 U.S. at 376.

83. United States v. Wright, 536 F.3d 819, 823 n.3 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 1656 (2009). In *Wright*, the defendant failed to raise an objection on hearsay grounds, and so the court's determination of forfeiture was based solely on confrontation clause analysis. *Wright*, 536 U.S. at 823 n.3. The only other circuit court to have touched on this issue did not comment on the co-extensiveness of the hearsay and confrontation exceptions, but analyzed both together under the preponderance standard hinted at in *Davis*. United States v. Vallee, 304 Fed. Appx. 916, 921 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2887 (2009).

84. United States v. Johnson, 495 F.3d 951, 971 (8th Cir. 2007), *cert. denied*, 129 S. Ct. 32 (2008) (emphasis added).

85. *See* United States v. Garcia-Meza, 403 F.3d 364, 370 (6th Cir. 2005) (noting that Confrontation Clause rights do not depend on the requirements of the Federal Rules of Evidence) (citing Crawford v. Washington, 541 U.S. 36, 61–62 (2004)).

86. California v. Green, 399 U.S. 149, 155 (1970).

respect, the "codifying" comment in *Giles* should be interpreted conservatively, allowing the analyses for the two exceptions to develop independently of one another.

III: CONTOURS OF THE EXCEPTIONS AND POSSIBILITIES FOR DIVERGENCE

Assuming a separate analysis for determining forfeiture under the hearsay rule and the Confrontation Clause, several potential differences invite attention. The questions of whether procedural hearings should be required to establish forfeiture, and the degree to which the practice of "bootstrapping" should occur, are issues worthy of consideration. Perhaps even more important, however, is the question of what the appropriate standard of proof should be in the Confrontation Clause analysis. This section will examine each of these issues in turn.[87]

A. Procedural Hearings

One of the issues left unaddressed in *Giles* is the procedural requirements for establishing forfeiture. Courts have split on the issue of whether an evidentiary hearing should be held before admitting evidence under the hearsay forfeiture exception. Some jurisdictions have made this mandatory, requiring that the "court must hold a hearing" prior to admitting such testimony.[88] In other courts hearings have been held without comment on the necessity of doing so.[89] In most of these cases, the hearing is requested by the offering party (usually the government) on account of its importance to the case.[90]

A minority of courts, however, have explicitly held that a hearing is not required.[91] Instead, the evidence of forfeiture is adduced in the presence of the jury, with its admissibility contingent upon sufficient proof being presented to establish the forfeiture. This method was adopted by the Eighth Circuit in *United States v. Emery*.[92] The court in *Emery* im-

87. These examples are illustrative, rather than exhaustive; other issues, including the differences between standards of review on appeal are beyond the scope of this paper.

88. *See, e.g.*, United States v. Thai, 29 F.3d 785, 814 (2d Cir. 1994) (citing United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir.1982); United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992)); *see also* United States v. Dhinsa, 243 F.3d 635, 656 (2d Cir. 2001) (requiring a *Mastrangelo* hearing prior to the admission of the challenged statements); People v. Johnson, 711 N.E.2d 967, 968–69 (N.Y. 1999) (requiring a hearing unless overwhelming evidence demonstrates a clear and convincing link between the defendant's actions and the unavailability of the witness).

89. *See, e.g.,* United States v. Smith, 792 F.2d 441, 442 (4th Cir. 1986) ("After an evidentiary hearing . . . ."); United States v. Price, 265 F.3d 1097, 1100 (10th Cir. 2001) (" The district court held a hearing on this and other pretrial motions.").

90. See Flanagan, *supra* note 29, at 488.

91. *See, e.g.*, United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999) ("The trial court did not therefore err in denying [the defendant] a preliminary hearing.").

92. *Id.*

ported the method from co-conspirator cases, reasoning that it shared a "functional similarity" with forfeiture-by-wrongdoing cases.[93] Drawing on the rationale from co-conspirator cases, it concluded "that the repetition necessarily inherent with a preliminary hearing would amount to a significant waste of judicial resources."[94]

The requirement of a preliminary hearing could present an area of significant difference between the hearsay and confrontation analyses. The analogy to co-conspirator cases seems an appropriate comparison for the codified forfeiture by wrongdoing hearsay exception, but the practice outlined in *Emery* seems to present serious problems when it comes to the Confrontation Clause. The forfeiture of a constitutional right should be granted only after the grounds for that forfeiture have been clearly established.[95] Indeed, the Court in *Giles* cautioned against reliance on the analogy to co-conspirator cases, recognizing that "[t]he co-conspirator hearsay rule does not pertain to a constitutional right and is in fact quite unusual."[96] To allow testimony which is immune from confrontation, only to discover that the evidence should never have been allowed, would likely be error requiring a new trial. Where objections are made on both hearsay and Confrontation Clause grounds, courts should require a preliminary hearing to determine whether the right has been forfeited, even if only for Confrontation Clause purposes. Those jurisdictions not requiring such a hearing for the 804(b)(6) exception could continue the practice in cases in which no objection is made on Confrontation Clause grounds, or in those cases (such as civil suits) where the Confrontation Clause is inapplicable.

B. Corroborating Evidence and Bootstrapping

The sufficiency of the evidence in question to establish the forfeiture needed to admit it is another issue which the court left unaddressed in *Giles*.[97] The admissibility of this so-called "bootstrapping" is a significant question for lower courts left with the task of deciphering *Giles*. As it applies to the hearsay exception, some courts have expressed doubt as to a requirement for independent proof.[98] But even the statements of co-conspirators require at least some independent evidence to establish the

93. *Id.*
94. *Id.*
95. See Part III.C regarding the appropriate standard for establishing forfeiture. Even if a preponderance standard is adopted, it should be met prior to admitting evidence which would otherwise offend the Sixth Amendment.
96. Giles v. California, 554 U.S. 353, 374 n.6 (2008).
97. *See The Supreme Court 2007 Term–Leading Cases*, *supra* note 8, at 337 ("[I]n not clearly addressing the issue of evidentiary 'bootstrapping,' the Court promulgated a test without providing lower courts the guidance needed to apply it.").
98. *See Emery*, 186 F.3d at 927 (describing the requirement of independent proof as "a matter that we are inclined to doubt").

conspiracy, since under the rules of evidence they are to be "considered but are not alone sufficient."[99] Thus, even courts which consider forfeiture by wrongdoing to be analogous to statements by co-conspirators should at least require some baseline of corroborating evidence, regardless of which context the exception is analyzed under.[100] Because forfeiture under the Confrontation Clause implicates a foundational constitutional right, however, it would make sense to require an even greater level of independent corroborating evidence in order to establish forfeiture.

C. Standards of Proof

The standard by which a forfeiture must be demonstrated is another one of the issues which the Court, even after *Giles*, has yet to address. For the hearsay rule exception, the standard by which a forfeiture must be demonstrated has been established through the Federal Rules.[101] Prior to the 1997 amendment, the standard varied. The preponderance standard was used by most, but the higher clear and convincing standard was recognized by a small minority.[102] The Fifth Circuit pioneered the application of the clear and convincing standard in *United States v. Thevis*.[103] The Fifth Circuit characterized the situation as one in which the "reliability of [the] evidence is a primary concern,"[104] as it implicated the Confrontation Clause as well as hearsay concerns. Relying on the Supreme Court's decision in *United States v. Wade*,[105] the court found the clear and convincing standard to be necessary for establishing forfeiture in either context.[106] The same reasoning was followed by the trial judge in *United States v. Houlihan*.[107] On appeal, the First Circuit discussed the standard applied in *Thevis* but found the preponderance standard which applies to the co-

99. *See* FED. R. EVID. 801(d)(2) ("The contents of the statement shall be considered but are not alone sufficient to establish . . . the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered . . . .").

100. An additional argument could be made that even for the hearsay forfeiture exception, a greater distinction should be recognized. Statements by co-conspirators are, by definition, not hearsay under FED. R. EVID. 801(d)(2). As an exception, rather than an exemption, a statement falling under 804(b)(6) is inherently even less reliable, and consequently in need of even stronger corroboration.

101. FED. R. EVID. 804(b)(6) advisory committee's notes ("The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage.").

102. *See* id.

103. 665 F.2d 616 (5th Cir. 1982).

104. *Id.* at 631 ("The prosecution, for example, must prove by clear and convincing evidence that an in-court identification that follows a tainted identification has a reliable independent basis before the identification can be admitted into evidence."), *superseded by* FED. R. EVID. 804(b)(6), *as recognized in* United States v. Zlatogur, 271 F.3d 1025, 1028 (11th Cir. 2001).

105. 388 U.S. 218 (1967).

106. *Thevis*, 665 F.2d at 631 ("Where reliability of evidence is a primary concern, the Supreme Court has conditioned admissibility on the 'clear and convincing' standard.").

107. 887 F.Supp. 352, 358 (D. Mass. 1995) (" [T]he Fifth Circuit's decision in *Thevis* is similar in many respects to the instant case and therefore provided this Court with guidance.")

conspirator exception to be "the better comparison."[108] It overruled the trial judge and adopted the preponderance standard in the First Circuit.[109] While this standard for the hearsay exception was uniformly changed with the adoption of Federal Rule of Evidence 804(b)(6), the standard for determining forfeiture under the Confrontation Clause was not necessarily affected by the rule.[110] *Thevis* has been overruled to the extent that it implemented a standard of proof for the hearsay exception, but this should not necessarily preclude consideration of its rationale for determining forfeiture under the Confrontation Clause.

So far the Supreme Court has not explicitly dealt with the issue of what standard should be used for determining forfeiture of the confrontation right.[111] The Court discussed the preponderance standard used by Federal Rule of Evidence 804(b)(6) in *Davis* but did so with the explicit caveat that it was "tak[ing] no position on the standards necessary to demonstrate such forfeiture."[112] In *Giles*, where the application of forfeiture by wrongdoing formed the crux of the case, the majority opinion did not so much as mention the applicable forfeiture standards. The only place in *Giles* where a standard is mentioned is in Justice Souter's concurrence, where he assumes, without comment, that "judges would find by a preponderance of [the] evidence that the defendant killed (and so would admit the testimonial statement), while the jury could so find only on proof beyond a reasonable doubt."[113] This assumption should be viewed, however, as merely illustrating the possible disparity between a judicial determination of the facts establishing forfeiture and a jury's ultimate evaluation of those same facts. As such, Justice Souter's comment should not be taken as an expression of his own views on the proper standard, much less the rest of the Court's. The issue has yet to be definitively addressed.

A simple finding by preponderance of the evidence may be an appropriate standard for the hearsay exception, but the implication of a constitutional right should demand a higher threshold of proof. Especially considering the "presumption against the waiver of constitutional rights,"[114] the prospect of stripping away a constitutional right on the basis of a mere finding by preponderance seems manifestly inappropriate. While the principle of forfeiture is admittedly different from waiver, the standard re-

108. United States v. Houlihan, 92 F.3d 1271, 1280 (1st Cir. 1996).

109. *Id.*

110. *See* United States v. Scott, 284 F.3d 758, 762 (7th Cir. 2002) (acknowledging "potential differences between the substantive forfeiture standards or standards of review under these two provisions").

111. *See The Supreme Court 2007 Term--Leading Cases*, *supra* note 8, at 337 (noting that the Court has "declin[ed] to specify the standard of proof judges should require to find intent").

112. Davis v. Washington, 547 U.S. 813, 833 (2006).

113. Giles v. California, 554 U.S. 353, 379 (2008) (Souter, J., concurring in part).

114. Brookhart v. Janis, 384 U.S. 1, 4 (1966) (citing Glasser v. United States, 315 U.S. 60, 70–71 (1942)).

quired for waiver is instructive here. In order for a defendant's waiver of the Sixth Amendment right to confrontation to be effective, "it must be *clearly established* that there was 'an intentional relinquishment or abandonment"' of the right.[115] The relevant intent in the context of forfeiture is obviously a different issue, but the same level of certitude—that it be *clearly established*—ought to be maintained in cases of forfeiture as well. Although the preponderance standard has already been embraced by the Federal Rules of Evidence on this point, a departure from the Rules on this issue should not be cause for concern. As the Court itself acknowledged in *Crawford*, "we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence."[116]

This sentiment is reinforced by a consideration of the underlying rationales for the various standards of proof. Proof rules essentially serve two functions: to minimize risk of error and to allocate the risk of error between parties.[117] The standard of proof ordinarily utilized by the Federal Rules of Evidence is the preponderance of the evidence standard.[118] By establishing a fairly minimal threshold, it "expresses a choice to treat parties roughly equally with regard to the risk of error and to attempt to minimize total errors."[119] By contrast, higher levels of proof, such as "beyond a reasonable doubt" or the intermediate "clear and convincing" evidence standard, "allocate more of the risk of error (or expected losses) away from defendants."[120] In the context of the hearsay rule, a lower standard of proof for establishing forfeiture is appropriate, given the broad range of situations to which it may apply, and especially considering the concerns which motivated the adoption of the rule.

The same rationale does not apply, however, in the context of a defendant's constitutional rights. In order to deem the Sixth Amendment rights of an accused to be forfeited, the standards by which that determination is made should provide the safeguard of ensuring that any risk of error in the decision is allocated *away* from the defendant. Employing two different standards for the exceptions might be seen by some as inconsistent, but the distinction is warranted by the separate concerns which animate the different settings in which the doctrine appears. A lower standard for the hearsay rule allows it to serve its broad function in a way that suits the variety of situations in which it applies, while a heightened standard would be available to protect an important constitutional right in the limited context in which it applies. The higher standard for establishing

115. *Brookhart*, 384 U.S. at 4 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)) (emphasis added).
116. Crawford v. Washington, 541 U.S. 36, 61 (2004).
117. *See* Michael Pardo, *Second-Order Proof Rules*, 61 FLA. L. REV. 1083, 1086 (2009).
118. *See* FED. R. EVID. 104(a).
119. Pardo, *supra* note 117, at 1084–85.
120. *Id.* at 1085.

forfeiture of confrontation rights would only be implicated in criminal cases, and then only where "testimonial" statements are offered against the defendant. Given its limited applicability and the importance of the right it protects, a difference between the forfeiture by wrongdoing exceptions would be amply justified.[121]

IV: CONCLUSION

The relationship between the hearsay rules and the Confrontation Clause has been clarified a great deal in the wake of *Crawford*, *Davis*, *Giles*, *Melendez-Diaz*, and *Bryant*. Notwithstanding the guidance provided by this recent line of cases, it remains true to at least some degree that "[t]he Supreme Court has yet to plot the crossroads at which the Confrontation Clause and the hearsay principles embedded in the Evidence Rules intersect."[122] While this fact has been acknowledged in other areas, the possible distinctions concerning forfeiture by wrongdoing have been almost completely overlooked. The tendency to ignore distinctions in this area seems only to have been furthered by the Court's beguiling comment that Rule 804(b)(6) "codifies the forfeiture doctrine."[123] As this Note has demonstrated, the text and history of the Rule itself, the context of the Court's statement, and the interpretation of other courts all belie a rigid interpretation of this claim. As the Court itself has suggested, a complete overlap between the hearsay rules and Confrontation Clause should not be lightly assumed.[124] In the absence of clear language from the Court that the two are to be treated identically, there is good reason to treat the two articulations of the forfeiture by wrongdoing exception separately.

Given the newness of the approach articulated in *Giles* and the paucity of Supreme Court opinions dealing with Federal Rule of Evidence

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121. Even if the Court were to ultimately determine that a preponderance standard should be utilized across the board, it should be remembered that this would only be dispositive for the purposes of the federal judiciary. As a standard for admissibility, rather than a substantive requirement, the issue of admissibility could still be resolved independently by state courts. New York, for instance, has "always required that the defendant's complicity be established by clear and convincing evidence." Flanagan, *supra* note 28, at 469 (citing Holtzman v. Hellenbrand, 460 N.Y.S.2d 591, 596–97 (N.Y. App. Div. 1983); People v. Geraci, 649 N.E.2d 817, 821 (N.Y. 1995) (stating that the clear and convincing standard is "most protective of the truth-seeking process" and should be applied in New York); People v. Sweeper, 471 N.Y.S.2d. 486, 488 (N. Y. Sup. Ct. 1984) (stating that although other circuits have applied the preponderance of evidence test, the State of New York applies the clear and convincing test)). The 1997 Amendment to the Rules of Evidence may have implemented a uniform federal standard for the hearsay forfeiture rule, but its force on the states is merely suggestive. At least in those states which recognize a higher standard of proof for the hearsay exception, the determination of forfeiture will have to involve independent consideration of the requirements of the Confrontation Clause and the state hearsay rules.

122. United States v. Houlihan, 92 F.3d 1271, 1281 (1st Cir. 1996).

123. Giles v. California, 554 U.S. 353, 354 (2008) (quoting Davis v. Washington, 547 U.S. 813, 833 (2006)).

124. *See* California v. Green, 399 U.S. 149, 155 (1970).

804(b)(6), there is substantial room for the independent development of the exception in both settings. In recognizing the independence of these doctrines, the establishment of a higher standard of proof in the Confrontation Clause analysis is of primary importance. Other issues, such as the requirement of a preliminary hearing or the necessary level of corroborating evidence to establish forfeiture, also seem amenable for distinct treatment with greater protections afforded in the Confrontation Clause context. Beyond this, however, other possible differences may await exploration.

As situations involving forfeiture by wrongdoing arise in criminal proceedings, advocates should consider how potential differences between the two exceptions might work to their clients' benefit in individual cases. Differences highlighted through the adversarial process may reveal even more important distinctions than those noted here. As courts interpret and apply *Giles* in their various jurisdictions, a strict continuity of the two exceptions should not be assumed; forfeiture by wrongdoing should not be misconstrued as a monolithic entity. The Supreme Court's conception of two divergent branches from a common root[125] is an apt metaphor; regardless of the degree to which the two exceptions intertwine and overlap, the analysis should be informed by an awareness of the duality of forfeiture by wrongdoing.

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125. *Giles*, 554 U.S. at 365 ("[I]t seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots.") (quoting Dutton v. Evans, 400 U.S. 74, 86 (1970)).

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