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At the Heart of Justice: Combating Gang-Perpetrated Witness Intimidation with Forfeiture-by-Wrongdoing After Giles v. California

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At the Heart of Justice: Combating Gang-Perpetrated Witness Intimidation with Forfeiture-by-Wrongdoing After *Giles v. California*[1]

By: Katie M. McDonough*

"[T]here is hardly any reason to apply a burden of proof which might encourage behavior which strikes at the heart of the system of justice itself."[2]

I. INTRODUCTION

Gangs are a growing threat to the communities in which they operate as well as to the operation of the criminal justice system.[3] Inherent in gang culture is strong loyalty among gang members coupled with "no snitching" policies enforced through intimidation and retaliation.[4] Witnesses to crime, gang members who have knowledge of misdeeds, and even entire communities are fearful about coming forward and cooperating with law enforcement about what they know.[5] The risk they run by cooperating with law enforcement is real: many witnesses are attacked or killed, and people in gang-controlled communities who report crimes to law enforcement face the prospect of crimes against their person, property, and family members.[6] Criminal gangs benefit from enforcing "no snitch" policies using intimidation and retribution.[7]

Successful witness intimidation or murder renders a witness unavailable, which means that the witness's testimony is likely to be inadmissible in court.[8] This often forces prosecutors to delay trial, reduce charges, or drop a case altogether, bringing the wheels of justice to a

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[1] 353 U.S. 554 (2008).

* Katie M. McDonough, Seton Hall University School of Law, 2013; College of the Holy Cross, 2008.

[2] U.S. v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982).

[3] *See infra* text accompanying notes 38~~37~~–40~~39~~, 55~~54~~.

[4] *See infra* note 57~~56~~.

[5] *See infra* note 74~~73~~ and accompanying text.

[6] *See infra* note 103~~94~~, 104~~95~~.

[7] *See infra* text accompanying note 108~~99~~.

[8] FED. R. EVID. 802 (restyled).

grinding halt.[9] The evidentiary doctrine of "forfeiture by wrongdoing" provides a means to overcome the hurdle of an unavailable witness if the government can show that the defendant's conduct caused the unavailability of the witness and did so with the requisite intent to silence him.[10] The forfeiture-by-wrongdoing exception, as it stands, leaves open the possibility that a defendant who joined a gang with a known enforcement policy against "snitching" will benefit if members of his gang unilaterally intimidate witnesses called against him. Under the federal rule, the prosecution will, at the very least, have to prove that the defendant "acquiesced" in the intimidation.[11] If the testimony in question contains testimonial statements, the prosecution will have to take the extra step of showing "specific intent," which, if narrowly construed, will allow the defendant to benefit from intimidation by his peers as long as he did not specifically take part in or authorize the intimidation.[12]

One challenge in many gang-related trials is finding proof that a gang member-defendant took part in the intimidation, specifically intended it to occur, and was a direct cause of it. While a defendant is in jail awaiting trial, his fellow gang members are often able and willing to act on his behalf and carry out his gang's "no snitch" policy by terrorizing, intimidating, harming, or even murdering adverse witnesses, mandating a miscarriage of justice in the process.[13] Gang members will harm or kill witnesses in retaliation for cooperating with police.[14] The "no snitch"

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[9] *See infra* note 10596.
[10] *See generally* Giles v. Cal., 554 U.S. 353 (2008); *see infra* text accompanying note 167156.
[11] FED. R. EVID. 804(b)(6) (restyled).
[12] *See infra* text accompanying note 161150.
[13] *E.g.*, David Kocieniewski, *With Witnesses at Risk, Murder Suspects Go Free*, N.Y. TIMES, Mar. 1, 2007, *available at* http://www.nytimes.com/1996/12/22/nyregion/gang-rivalry-cited-in-police-captain-s-shooting.html?ref=davidkocieniewsk (describing how prolific witness intimidation in New Jersey turns "slam-dunk cases" into failed prosecutions, like the case of one particular gang member, who witnessed a murder but "quickly announced he would never testify for fear he would be ostracized for helping the police–or wind up murdered himself") [hereinafter *Witnesses At Risk*].
[14] *E.g.*, Urias v. Horel, No. CV 07-7155-JVS (RNB), 2008 WL 4363064, at *2–3 (C.D. Cal. 2008) (civilian bystander to gang shooting was instructed not to attend court and then shot to death).

policy is enforced against gang members and civilians alike.[15] With key witnesses unavailable, a prosecutor is hard-pressed to continue his case because he cannot admit the witness's prior statements without an exception, such as the forfeiture-by-wrongdoing doctrine.[16]

This Comment addresses the unique challenges of invoking forfeiture by wrongdoing against a gang member defendant whose gang silences adverse witnesses on his behalf. Part II illustrates that gang culture inspires loyalty in its members, who willingly intimidate and silence witnesses in accordance with a gang's "no snitch" policy. It explains how gangs can subdue an entire community using terror, threats, and violence to ensure that citizens do not cooperate with the police, and it demonstrates that such "no snitch" policies, when enforced through intimidation and retaliation, hinder the criminal justice process. Part III suggests that Congress and state legislatures should amendforfeiture-by-wrongdoing evidentiary rules to declare that proof that a gang member-defendant who joined a gang with a history of enforcing a "no snitch" policy using intimidation or retaliation—or remained a member with knowledge that the gang engaged in such tactics—coupled with evidence that other gang members caused an adverse witness's unavailability in the defendant's trial, constitutes sufficient evidence of specific intent to silence a witness in accordance with the requirements of the evidentiary and Constitutional exceptions.

II. LOST TESTIMONY: GANG-ENFORCED "NO SNITCH" POLICIES SILENCE WITNESSES

Organized street gangs are not a new phenomenon, and street-gang culture is not a contemporary invention. It is a common occurrence in many urban communities, new immigrant

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[15] *E.g.*, David Kocieniewski, *A Little Girl Shot, and a Crowd that Didn't See*, N.Y. TIMES, Jul 9, 2007, *available at* http://www.nytimes.com/2007/07/09/nyregion/09taj.html?pagewanted=all (relating how the grandmother of a seven-year-old girl killed in the crossfire of a gang fight would not talk to the police for fear she would "have to move out of the country, and that at least twenty other eyewitnesses remain unwilling to testify about this unsolved homicide).

[16] *Witnesses at Risk*, *supra* note 13~~12~~.

groups, and poverty-stricken neighborhoods with few social controls.[17] Poverty, heterogeneity of race or ethnicity, and residential mobility are, together, indicators of a high degree of delinquency in a community.[18] Such a community is ripe for the development of street gangs. Frederick M. Thrasher, an early twentieth-century criminologist, described the development of gangs in this way:

> The gang is an interstitial group originally formed spontaneously, and then integrated through conflict. It is characterized by the following types of behavior: meeting face to face, milling, movement through space as a unit, conflict, and planning. The result of this collective behavior is the development of tradition, unreflective internal structure, *esprit de corps*, solidarity, morale, group awareness, and attachment to a local territory.[19]

Gang members, even if organized informally, share experiences and loyalty that forms them into a cohesive unit.[20] A 1928 chronicle of the rise of early nineteenth-century gangs in New York City explained that poverty, instability at home, lack of direction, and community disorganization fostered the development of gangsters in those urban slums.[21] Even then, welfare agencies and religious leaders faced seemingly insurmountable challenges in combating the petty crime, violence, gambling, widespread alcohol abuse, starvation, and squalor among which the gangs proliferated.[22]

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[17] Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence, and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 189 (2008) ("[C]onditions of structural poverty strain a community's ability to develop informal social controls. Socially organized or cohesive communities are better able to engage in informal social control that can lead to lower levels of crime than communities that are not cohesive.").
[18] SOPHIE BODY-GENDROT, THE SOCIAL CONTROL OF CITIES?: A COMPARATIVE PERSPECTIVE 7 (Blackwell 2000) (referencing the observation of criminologists Shaw and McKay that it is difficult to free a neighborhood from these conditions).
[19] FREDERICK M. THRASHER, THE GANG: A STUDY OF 1,313 GANGS IN CHICAGO 46 (1927).
[20] ALBERT K. COHEN, DELINQUENT BOYS: THE CULTURE OF THE GANG 13, 35 (The Free Press 1955). They share a "delinquent subculture" that "is itself a positive code with a definite if unconventional moral flavor." *Id.*
[21] HERBERT ASBURY, THE GANGS OF NEW YORK xvi (Alfred A. Knopf, Inc. 1928).
[22] *Id.*, at 15–16.

Gangs manifest their own norms comprising unique rules and customs.[23] Gang culture is not a new phenomenon: even gangs in the early twentieth century possessed their own names, clothing styles, reputations, and lore.[24] At bottom, the unique style and identifying characteristics of each of those street gangs is not dissimilar to the gang colors, graffiti signs, turf wars, and criminal enterprises that contemporary street gangs have adopted. Today, gang members are tattooed with gang identifiers, wear certain style of dress adopted by their gang, and display gang insignia on jackets, hats, and pants.[25] Hispanic gangs often wear white tee shirts and a black or blue knit cap, while black gangs such as Blood and Crip gangs dress individually but wear red or blue accessories, respectively.[26] Graffiti is utilized to mark gang turf, indicate gang status, make threats against a rival gang, or declare participation in a particular crime that was committed.[27]

Gangs set themselves apart from the communities that they seek to control.[28] A 1950s examination of delinquent youth gangs concluded that gangs emphasize their autonomy and capitulate only to internal pressures, causing "intensely solidary and imperious" relations with gang members and "indifferent, hostile and rebellious" relations with non-gang members and

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[23] *E.g.*, Ray Rivera, *In Newburgh, Gangs and Violence Reign*, N.Y. TIMES, May 11, 2010, *available at* http://www.nytimes.com/2010/05/12/nyregion/12newburgh.html?sq=gang%20culture&st=nyt&adxnnl=1&scp=3&adxnnlx=1329195879-V9JrNbOnzk7fWHmncqs8CA&pagewanted=1 (describing growth of local street gangs in Newburgh, New York and referencing gang flags, clothing, and the concept of "respect"); Serge F. Kovaleski, *Wanted: A Band of Men and Boys*, N.Y. TIMES, Aug. 15, 2007, *available at* http://query.nytimes.com/gst/fullpage.html?res=9B02E4D71539F936A2575BC0A9619C8B63&scp=10&sq=gang%20culture&st=nyt&pagewanted=1 (describing the recruiting tactics of MS-13 in New Jersey, its origins as a Salvatorian gang, and its colors).

[24] ASBURY, *supra* note 21~~20~~, at 28. For instance, in New York, the Daybreak Boys operated as an organized criminal enterprise committing heinous crimes on the riverfront, and the Molasses Gang would systematically rob stores and pick pockets. *Id.* at 66. The Dead Rabbits wore a red stripe on their pants, while the Plug Uglies, wearing plug hats, were feared for instilling terrible violence on their victims with bludgeons and pistols. *Id.* at 22.

[25] *Terror in Our Streets: A Special Report on Gang Violence in Southern California* (*Gang Characteristics*), L.A. DAILY NEWS, Sept. 29, 2004, http://lang.dailynews.com/socal/gangs/articles/dnp4_gcharacter.asp [hereinafter *Gang Characteristics*].

[26] *Id.*

[27] *Id.*

[28] Joseph Goldstein, *43 in Two Warring Gangs are Indicted in Brooklyn*, N.Y. TIMES, Jan. 19, 2012, *available at* http://www.nytimes.com/2012/01/20/nyregion/43-in-warring-brooklyn-gangs-are-indicted.html?scp=1&sq=gang+culture+kelly+respect&st=nyt (quoting Brooklyn district attorney's statement that street gang members in Brooklyn "band together to control their turf, their block or their building, and terrorize those who fail to recognize their control and fail to pay them respect").

authority figures.[29] This view of the delinquent youth gang is instructive—even if articulated before the proliferation of guns and drugs that characterize street gangs today—because it reinforces the assertion that the fundamental characteristics of gangs remain unchanged over time and place. Contemporary gang members may characterize their activity as a war between themselves and "the haves," and others will go as far as shootingrivals and police officers to make a name for themselves.[30] In either case, they are acting outside of the law and traditional norms. Gangs set themselves apart from their communities through active intimidation of residents and police officers in (often successful) attempts to establish control and instill fear.[31]

While not all street gangs are criminal, the gangs with which this Comment (and law enforcement) is concerned are those that engage in crime regularly. Although each law-enforcement organization has its own definition of what constitutes a "gang," nearly all list group criminality as the most important defining characteristic.[32] Local street gangs may be driven by the desire to control a neighborhood, such as the "Goodfellas," "one of Central Harlem's most violent and destructive street gangs" that trafficked in firearms used to intimidate

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[29] COHEN, *supra* note 2019, at 30–31.

[30] Tracy Manzer, *Terror in Our Streets: A Special Report on Gang Violence in Southern California* (*From His Own Words*), L.A. DAILY NEWS, Sept. 27, 2004, http://lang.dailynews.com/socal/gangs/articles/lbp2_james.asp.

[31] Beth Barrett, *Terror in Our Streets: A Special Report on Gang Violence in Southern California* (*Gangster Menace*), L.A. DAILY NEWS, Sept. 30, 2004, http://lang.dailynews.com/socal/gangs/articles/dnp5_main.asp [hereinafter *Gangster Menace*].

[32] *National Youth Gang Survey Analysis: Defining Gangs and Designating Gang Membership*, NAT'L GANG CTR., *available at* http://www.nationalgangcenter.gov/Survey-Analysis/Defining-Gangs#anchordcog (last visited Dec. 18, 2011). There are six definitional characteristics that are common to most definitions: (1) whether the group engages in criminality; (2) whether leadership is present; (3) whether the group has a name; (4) whether it displays colors or symbols; (5) whether the group hangs out together; and (6) whether the group has a turf or territory. *Id.* "Gangs" in the school setting may be defined as "a somewhat organized group, sometimes having turf concerns, symbols, special dress or colors . . . has a special interest in violence for status-providing purposes and is recognized as a gang by its members and by others," and as a group that "has a name and is engaged in fighting, stealing, or selling drugs." GARY D. GOTTFREDSON & DENISE C. GOTTFREDSON, GANG PROBLEMS AND GANG PROGRAMS IN A NATIONAL SAMPLE OF SCHOOLS 4 (2001), *available at* http://www.gottfredson.com/Gang_Problems_%20Programs/report.pdf.

rivals and keep them off Goodfella turf.[33] Gang activity is often conducted for reputational gain, both for the individual (as in the case of a Fairfax, Virginia MS-13 associate[34] sentenced to life in prison for offering young girls "free of charge to full-fledged gang members to improve his own standing"[35]) and for the gang (as in the case of an officer shot purposely to demonstrate to a rival gang that the shooter's gang was tough[36]). Some gangs make group criminality their primary purpose.[37] Large-scale organizations not only mastermind racketeering and narcotics trafficking for commercial gain, but "a slew of gangs, including the Bloods, Crips, Gangster Disciples, Vice Lords and Latin Kings are branching out into mortgage fraud, identity theft, the manufacturing of counterfeit checks, and bank fraud."[38] Today, gangs are active in all fifty states and, in some communities, are responsible for up to eighty percent of crime.[39] They are the main retail distributors of illegal drugs across the country and are increasingly involved in wholesale distribution.[40] But gang members do not merely engage in the drug trade. Alien-smuggling,

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[33] Colin Moynihan, *Prosecutors Target Gang in Harlem; 19 Charged*, N.Y. TIMES, Nov. 4, 2011, http://www.nytimes.com/2011/11/05/nyregion/19-arrested-as-prosecutors-target-goodfellas-gang-in-harlem.html?_r=1.

[34] *Gang Characteristics*, *supra* note 2524 (explaining that "associates" are not gang members but rather are on the fringe of gang activity; however, rivals often do not distinguish between a gang member and his associates).

[35] Andrea McCarren, *MS13 Street Gang and Others Tied to Child Prostitution*, 9 NEWS NOW, Nov. 4, 2011, http://www.wusa9.com/news/article/173540/187/Feds-Prosecute-Gang-Related-Child-Sex-Traffickers; *see, e.g.*, Beth Barrett, *Terror in Our Streets: A Special Report on Gang Violence in Southern California* (*Grieving Mothers*), L.A. DAILY NEWS, Oct. 1, 2004, http://lang.dailnews.com/social/gangs/articles/dnp6_main.asp [hereinafter *Grieving Mothers*] (explaining that a gang member's motive for killing an innocent victim in a drive-by shooting was to increase his standing within a Pacioma, California gang).

[36] *E.g.*, David Kocieniewski, *Gang Rivalry Cited in Police Captain's Shooting*, N.Y. TIMES, Dec. 22, 1996, at 40, *available at* http://www.nytimes.com/1996/12/22/nyregion/gang-rivalry-cited-in-police-captain-s-shooting.html?ref=davidkocieniewski.

[37] For a historic example, see ASBURY, *supra* note 2120, at 227–28 (describing gangs like the Whyos, a pre-Civil War New York City gang that committed crime for money, including murder, mayhem, breaking bones, or even chewing off a victim's ear).

[38] Loren Berlin, *Street Gangs Clean Up on White Collar Crime*, DAILY FINANCE, Oct. 28, 2011, http://www.dailyfinance.com/2011/10/28/street-gangs-new-dirty-moneymaker-white-collar-crime/.

[39] *Key Findings*: *National Gang Threat Assessment 2009*, iii NAT'L GANG INTEL. CTR. (Jan., 2009), *available at http://www.fbi.gov/stats-services/publications/national-gang-threat-assessment-2009-pdf*. There are nearly one million active gang members in the United States participating in the criminal activity of approximately 20,000 street gangs, motorcycle gangs, and prison gangs. *Gangs*, FED. BUREAU OF INVESTIGATION (Nov. 6, 2011), http://www.fbi.gov/about-us/investigate/vc_majorthefts/gangs/gangs.

[40] *Key Findings*: *National Gang Threat Assessment 2009*, *supra* note 3938.

armed robbery, auto theft, extortion, identity theft, and murder are among gangs' typical criminal activities today.[41]

Gangs defend their turf and fight rivals, such as today's much-publicized enmity between the Bloods and the Crips.[42] At its worst, gang street fighting—whether with muskets and pistols two centuries ago or handguns and automatics today—can hold an entire neighborhood hostage.[43] The presence of rival groups brings potential threats to an existing gang.[44] This increases gang unity and "fosters beliefs that protection comes from gang cohesion and the preparation for violence."[45] Gang violence has a cyclical nature that strengthens the perception that being a gang member is necessary for protection, and thus gangs grow and perpetrate violence against rivals to ensure that protection continues.[46] Gangs also may operate together to combat a common enemy; for instance, members and associates of the Mexican Mafia operate in various gangs outside of jail but work together for the Mexican Mafia while in jail.[47]

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[41] *National Youth Gang Survey Analysis*, *supra* note 3231.

[42] *E.g.*, *Grieving Mothers*, *supra* note 3534 (explaining the origins of the war between the Bloods and the Crips and noting that, for decades, the majority of gang murders in Los Angeles have been attributable to it).

[43] Keith Donoghue, Note, *Casualties of War: Criminal Drug Law Enforcement and its Special Costs for the Poor*, 77 N.Y.U. L. REV. 1776, 1786–87 (2002) ("Poor urban communities are the locus for drug transactions, which brings with them violence aimed to protect contested territory and intimidate informants."); ASBURY, *supra* note 2120, at 29 ("Sometimes the battles raged for two or three days without cessation, while the streets of the gang area were barricaded with carts and paving stones, and the gangsters blazed away at each other with musket and pistol . . . ."); *see also* Videtta A. Brown, *Gang Member Perpetrated Domestic Violence: A New Conversation*, 7 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 395, 402 (2007) ("When gang members are present, the atmosphere in neighborhoods is riddled with fear.").

[44] GOTTFREDSON, *supra* note 3231, at 7 (focusing on the rise of youth gangs in schools).

[45] *Id.*

[46] *Id.* ("[F]ear of violence leads to participation in the instigation of violence against sources of perceived threat."). It is difficult not to be reminded of the scene set by Thomas Hobbes as he portrayed of the state of nature:

> During the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man. . . . In such condition there is no place for industry, because the fruit thereof is uncertain: and consequently . . . no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short."

THOMAS HOBBES, LEVIATHAN 86 (Forgotton Books 2008).

[47] People v. Sisneros, 174 Cal.App.4th 142, 148 (Cal. Ct. App. 2009). The Mexican Mafia, or *Eme*, is a particularly fearsome gang that raises money by committing crimes, including murder, and employing various local neighborhood gangs to collect "taxes" from drug dealers. *Id.* A member of a street gang may become an *Eme* associate by earning money for the gang and assaulting inmates as instructed, and an associate may become one of its few members by gaining a sponsor and executing a killing on behalf of the gang. *Id.* The price of leaving the

Perhaps most fundamental to gangs is that they inspire and demand loyalty. The gang becomes, to members, "a separate, distinct and often irresistible focus of attraction, loyalty and solidarity."[48] By and large, whether a gang is made up of mere delinquents or hardened criminals willing to engage in gun violence, drug sales, and turf wars, all gangs retain cultural codes to which members adhere.[49] These codes generally mandate solidarity and loyalty to fellow gang members,[50] akin to family ties.[51] Many gangs have elaborate initiation procedures that can include getting "jumped in"—beat up by admitted members—to demonstrate total dedication to the gang.[52] Another common ritual for admittance is commission of a violent crime.[53] In many violent gangs, members must commit murder—often of a perfect stranger—to show their loyalty

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gang is death, and members and associates are permitted neither to admit their affiliation with the Mexican Mafia nor cooperate with law enforcement and inform on other affiliates. *Id.* at 147–48. Cooperation among rival gangs is not new: feuding gangs in nineteenth-century New York City at times joined to fight a common rival gang, ASBURY, *supra* note 21~~20~~, at 29, or attack police to render law enforcement ineffective on their turf. *Id.* at 24, 44, 235.

[48] COHEN, *supra* note 20~~19~~, at 31.

[49] *See, e.g.*, Beth Barrett, *Terror in Our Streets: A Special Report on Gang Violence in Southern California (L.A. Gang History Runs Deep)*, L.A. DAILY NEWS, Oct. 1, 2004, http://lang.dailnews.com/social/gangs/articles/dnp6_main.asp [hereinafter *L.A. Gang History*] ("Loyalty remains across geographic boundaries, with gang members keeping their affiliations as they change addresses across town or across the country.").

[50] Ellen Liang Yee, *Confronting the "Ongoing Emergency": A Pragmatic Approach to Hearsay Evidence in the Context of the Sixth Amendment*, 35 FLA. ST. U. L. REV. 729, 777 (2008) (observing that in gangs, "loyalty to the organization and hierarchy within the organization are strong forces that impact the relationships of the members of the organization," causing members to be reluctant to accuse one another and may be unwilling to cooperate with law enforcement out of fear of "serious harm to the accuser's welfare").

[51] *E.g.*, 1 ENCYCLOPEDIA OF ASIAN AMERICAN ISSUES TODAY 859 (Edith Wen-Chu Chen & Grace J. Yoo eds., ABC-CLIO, LLC 2010) (explicating that at-risk Asian American youths find comraderie, security, and cultural pride in joining street gangs, but with these benefits comes the need to retain the respect of this new "family" by witnessing or committing violent crimes).

[52] *E.g.*, State of Arizona v. McCoy, 928 P.2d 647, 650 (Ariz. 1996) (holding as evidence supporting conviction for participating in a criminal street gang that the defendant participated in his gang's "aggravated assaults on an ongoing basis as part of their ritual for initiating new members and ousting disloyal members," called "jumping in").

[53] *See* People v. Garcia, 64 Cal. Rptr. 3d 104, 108 (Cal. Ct. App. 2007) (recounting expert opinion that "respect is 'everything' to a gang member" and that both gangs and gang members earn respect by committing crimes, "especially violent crimes"); *see, e.g.*, AUGUSTINE E. COSTELLO, HISTORY OF THE POLICE DEPARTMENT OF JERSEY CITY 229 (The Police Relief Assoc. Publ'n Co. 1891) (stating that membership in the Lavas gang required a robbery, burglary, a single-handed assault on a police officer, or going to jail as a recruit).

and gain full membership.[54] Women who wish to join are "sexed in," or forced to have sex with gang members.[55]

Gang culture vigorously enforces a ban on assisting the police.[56] Specifically, gangs discourage giving information to police, called "snitching,"[57] even against members of other gangs.[58] Without resort to the legal system to enforce contracts and regulate underground commerce, gangs—particularly those involved in the drug trade—must employ intimidation and murder of informants and suspected informants to protect their business.[59] Gangsters make no secret of the fact that ratting out others in the business can have dire consequences.[60] In 2004, a much-circulated DVD titled "Stop Snitching" featured Baltimore gangsters who named names of snitches "in the game" and stated that snitches might "get a hole in their head."[61] In a Colorado

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[54] Alan Jackson, *Prosecuting Gang Cases: What Local Prosecutors Need to Know*, 42-JUN PROSECUTOR 32, 33–34 (National District Attorneys Association 2008); Brown, *supra* note 4342, at 408. This initiation procedure is not unique to contemporary street gang culture. *E.g.*, ASBURY, *supra* note 2120, at 227 (relating tales of the Whyo gang, which accepted members only after they committed a murder or other crime serious enough to demonstrate dedication to the gang).

[55] Videtta A. Brown, *supra* note4342.

[56] *E.g.*, David Kocieniewski, *So Many Crimes, and Reasons to Not Cooperate*, N.Y. TIMES, Dec. 30, 2007, http://www.nytimes.com/2007/12/30/nyregion/30witness.html?ref=davidkocieniewski ("[T]he Whitman Park section of Camden is on the front lines of the struggle with witness intimidation. An array of powerful forces converge here to discourage people from cooperating with the investigation of crimes—crimes committed against their own homes, their own neighbors, their own children. Drugs are sold openly from street corners and abandoned row houses. Gunfire is a neighborhood soundtrack. And the competing gangs that control Whitman Park have made it clear that the price for defying them is death.").

[57] *See* ALEXANDRA NATAPOFF, SNITCHING 3 (2009). Snitching was originally a word reserved for criminals who ratted out their associates in exchange for a lighter sentence or reduced charges, *id.*, but a "mentality has started to seep into the neighborhood where ordinary, upstanding people who would come forward because a crime occurred are now being told they are snitches." Brendan L. Smith, *Keeping A 'Snitch' from Being Scratched: Witness Intimidation Is Gaining Even As the Murder Rate Declines*, 94-DEC A.B.A. J. 20, 21 (2008) (internal quotation marks omitted).

[58] *E.g.*, People v. Sisneros, 174 Cal. App. 4th 142, 147 (Cal. Ct. App. 2009). In *Sisneros*, a shooting was perpetrated by an alleged associate of the Mexican Mafia, and an innocent witness—who was a member of a separate Hispanic street gang—knew the identity of the shooter. *Id.* Not only did the witness refuse to "snitch" to the police, he would not return to the neighborhood where the shooting took place, nor was he safe in police custody from the possibility of being beaten or killed because he witnessed the crime. *Id.*

[59] Stephen J. Schulhofer, *Solving the Drug Enforcement Dilemma: Lessons From Economics*, 1994 U. CHI. LEGAL F. 207, 220 (1994).

[60] *See Witnesses at Risk*, *supra* note 1312.

[61] NATAPOFF, *supra* note 5756, at 122.

case,[62] a defendant was found guilty of charges including first-degree murder for paying his friend and two members of an ethnic Cambodian gang a total of $20,000 to shoot and kill a cooperating witness after the witness implicated the defendant in the sale and distribution of drugs.[63]

"No Snitching" is now a popular refrain that summarizes gang culture's ban on police cooperation.[64] The producer of the "No Snitching" DVD[65] insisted that the DVD was directed at criminal associates, not "civilian witnesses,"[66] but it became a popular symbol that extended beyond the world of gangsters. "Stop Snitching" tee shirts began to appear in courtrooms to intimidate non-gang-affiliated witnesses,[67] celebrity rappers such as Lil' Kim and Busta Rhymes publicly refused to share information about shootings they witnessed,[68] and commentators began to cover the "No Snitching" phenomenon in mainstream media.[69]

While "No Snitching" used to be a policy reserved for gang members, regular citizens in some communities are treated as "snitches" simply for talking to or cooperating with law enforcement.[70] The 2000 National Youth Gang Survey stated that gang-related witness intimidation was reported as "common" by sixty-six percent of responding law-enforcement agencies.[71] In that same survey, eighty-two percent of respondents stated that their agencies

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[62] *See generally* People v. Hagos, 250 P.3d 596 (Colo. App. 2009).
[63] *Id.* at 606–07.
[64] *See* NATAPOFF, *supra* note 5756.
[65] *Id.*
[66] *Id.* at 5756.
[67] *See* Fox Butterfield, *Guns and Jeers Used by Gangs to Buy Silence*, N.Y. TIMES, Jan. 16, 2005, http://www.nytimes.com/2005/01/16/national/16gangs.html (relating that gang members were in the courtroom wearing tee-shirts that said "Stop Snitching" when two other gang-members were on trial for murdering a ten-year-old).
[68] Rick Hampson, *Anti-Snitch Campaign Riles Police, Prosecutors*, USA TODAY, Mar. 28, 2006, http://www.usatoday.com/news/nation/2006-03-28-stop-snitching_x.htm.
[69] NATAPOFF, *supra* note 5756, at 122–24.
[70] IMAGINING LEGALITY: WHERE LAW MEETS POPULAR CULTURE 59 (Austin Sarat ed., Univ. of Ala. Press 2011).
[71] John Anderson, *Gang-Related Witness Intimidation* 1, NATIONAL GANG CENTER BULLETIN (Feb. 2007).

were taking action to correct the problem.[72] A general sense of fear is not uncommon in a gang-controlled locale marred by a history of violent retaliation against witnesses and a community-wide distrust of the criminal justice system.[73]

Today, the wheels of justice have come to a near stop in some communities in significant part because the violence associated with witness intimidation by gangs has spread beyond gang members to those who live in gang-controlled communities.[74] To compound the problem, the communities in which gangs proliferate tend to have a history of poor relations with local law enforcement on which gangs can capitalize.[75] Increased policing in violent neighborhoods, if ineffective, can garner the ire and distrust of the innocent civilians who reside there.[76] There exists a sentiment that the police fail to protect black Americans and thus cause the epidemic of drugs and violence concentrated in black neighborhoods.[77] Poor urban communities have a history of experiencing police brutality and racially discriminatory enforcement practices that

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[72] *Id.* at 1.

[73] PETER FINN & KERRY MURPHY HEALEY, PREVENTING GANG- AND DRUG-RELATED WITNESS INTIMIDATION: ISSUES AND PRACTICES 1-2 (Nat'l Inst. of Justice 1996). This fear is not new: a history of the Jersey City police describes street gangs that were "composed of young rowdies" who would regularly insult or spit on women, but women would refuse to file formal complaints and "thus hinder the wheels of justice." COSTELLO, *supra* note 5453, at 330.

[74] NATAPOFF, *supra* note 5756, at 124 (observing that gang culture's "no snitching" code "melded with the long-standing problem of witness intimidation, and the related reluctance of civilian witnesses to come forward when they observe violent crime").

[75] *Id.* at 126;*see also* PAUL B. WICE, CHAOS IN THE COURTROOM: THE INNER WORKINGS OF URBAN CRIMINAL COURTS 170–71 (1985) (observing that, in urban courts, defendants are often of lower socio-economic status which can affect their treatment by the court, including increasing the court's willingness to incarcerate poor uneducated defendants who have been through the criminal justice system before).

[76] Diana Nelson Jones, *Don't Shoot: Stopping Urban Violence with Sweet Reason*, PITTSBURGH POST-GAZETTE, Dec. 18, 2011, http://www.post-gazette.com/pg/11352/1197140-148.stm.

[77] RANDALL KENNEDY, RACE, CRIME AND THE LAW 71 (Random House 1998); *see id.* at 20 (observing that racially-motivated misconduct appears disproportionately harmful and nefarious because it is official action by the state); *see, e.g.*, Beth Barrett, *Terror in Our Streets: A Special Report on Gang Violence in Southern California* (*Bratton's Challenge: LAPD's New Chief Believes Gang Problem Can Be Solved*), L.A. DAILY NEWS, Oct. 2, 2004, http://lang.dailynews.com/socal/gangs/articles/ALL_p1side1.asp [hereinafter *Bratton's Challenge*] (explaining that history of poor relations with the LAPD increases the challenge of reducing crime, and the solution is increased investment in police officers who can become experts on particular neighborhoods).

have led to a history rife with distrust, actual and perceived injustice, and even rioting.[78] This history contributes to the acquiescence of entire communities to the gang culture's code of silence, but it is not the only factor.

Citizens in some gang-controlled communities must practice willful blindness to gang criminality in order to survive.[79] People who live in gang-controlled communities are subject to constant fear and calculated intimidation, such as demands for money whenever a resident leaves his home, public drug sales and loitering by gang members, and attacks on person and property as retaliation for talking to the police.[80] In a recent Michigan case, an innocent witness who had information about the shooter in a gang-related attack refused to tell the police anything until he himself was threatened with an investigation.[81] He explained that the code of the street is "[don't] snitch," and he had to obey out of fear for his life, even though he wasn't a gang member.[82] In fact, "[f]ear of gang retaliation among honest citizens in gang-dominated neighborhoods" has the added effect of forcing the prosecution to rely on unwilling or tainted witnesses, such as co-defendants, for testimony in gang cases because innocent witnesses refuse to cooperate or take the stand.[83]

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[78] *See* KENNEDY, *supra* note 7776, at 115–20 (describing instances of police brutality, questionable acquittals of police officers by all-white juries, and the race riots that subsequently ensued).

[79] *See* FINN, *supra* note 7372, at 4.

> Many of the communities in which gangs operate are worlds unto themselves—places where people live, attend school, and work all within a radius of only a few blocks beyond which they rarely venture. As a result, victims and witnesses are often the children of a defendant's friends or relatives, members of the same church as the defendant, or classmates or neighbors. Furthermore, community residents may regard many of the crimes for which witnesses are sought as "business matters" among gang members or drug dealers, rather than as offenses against the community which should inspire willing civic participation in the process of law enforcement.

Id.

[80] Beth Barrett, *Terror in Our Streets: A Special Report on Gang Violence in Southern California* (*Living In Fear: Gangs Keep Stranglehold on Southland Cities*), L.A. DAILY NEWS, Sept. 28, 2004, http://lang.dailynews.com/socal/gangs/articles/dnp3_gang3.asp [hereinafter *Living in Fear*].

[81] Jones v. Warren, No. 1:07-cv-894, 2010 WL 3779277, at *6 (W.D. Mich. Aug. 20, 2010).

[82] *Id.*

[83] FINN, *supra* note 7372, at 4.

Urban (predominantly black) communities have a different conviction rate than suburban (predominantly white) communities, depending on the type of crime.[84] In urban areas, drug felony convictions are highest; as a result, there is a high rate of imprisonment of the urban population on account of drug offenses.[85] In contrast, violent felonies are cleared by police at a significantly lower rate in urban neighborhoods than in suburban neighborhoods.[86] This is in large part due to "the economics of law enforcement," which aims to punish as many crimes as budgets allow.[87] Drug convictions are easy to prosecute and cheap to obtain.[88] With violent crime, on the other hand, prosecution is pricey and convictions are rare. Gangs—which operate primarily in urban communities—are incredibly effective at eliminating the witnesses necessary to prove violent felonies in a court of law.[89] An unintended result is that similar crimes are punished differently in different demographic communities.[90] William Stuntz refers to this as "discriminatory justice" that "runs headlong into the moral argument for treating criminals and crime victims from different demographic groups the same."[91] Witness intimidation by gangs, then, has not only a local effect on crime rates, but a broad impact on the administration of criminal justice and its sociological effects.

A prosecutor from Suffolk County, Massachusetts relayed that witness intimidation not only "results from the tight-knit geography of poor neighborhoods where witnesses and gang members often know one another," but also because "gang members have become more

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[84] WILLIAM J. STUNTZ, THE COLLAPSE OF THE CRIMINAL JUSTICE SYSTEM 55 (2011).
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*, at 79-81.
[90] STUNTZ, *supra* note 8483, at 55.
[91] *Id.*

brazen."[92] In California, a drug addict named Bobby Singleton was purchasing rock cocaine in an apartment building controlled by a gang known as The Mob Crew when a rival gang member opened fire.[93] Injured in the cross-fire, Singleton told police he was able to identify the shooter, a member of the Primera Flats gang.[94] When the shooter was released on bail, he appeared at Singleton's residence, instructed Singleton not to appear in court, stated "I will look for you and kill you," and flashed a gun.[95] Two days later, the shooter returned in a van with his associates and took Singleton away.[96] Singleton was found later that night on a bench, shot to death.[97] Such a tragic ending for the innocent bystanders to, and victims of, violent crime is not a rarity in gang-infested communities, and such stories send a message to entire communities that all citizens—not just gang members—must remain silent on pain of death.

Gangs' emphasis on loyalty coupled with a willingness to intimidate and retaliate renders it unsurprising when gangs interfere with a witness on behalf of a member who is on trial. Gang members will appear in court as observers because their mere presence can frighten witnesses into not testifying.[98] Sometimes, a courtroom may be closed to the public,[99] but generally the constitutional right to public trials and the fact that the intimidation may go undetected are impediments to combating such intimidation by associates of the defendant.[100] Incarcerated witnesses are also in great danger of gang-related intimidation[101] because gangs have members

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[92] Butterfield, *supra* note 6766.
[93] Urias v. Horel, No. CV 07-7155-JVS (RNB), 2008 WL 4363064, at *2–3 (C.D. Cal. 2008).
[94] *Id.* at *3.
[95] *Id.*
[96] *Id.* at *4.
[97] *Id.*
[98] FINN, *supra* note 7372, at xi.
[99] Rachel G. Piven-Kehrle, Annotation, *Basis for Exclusion of Public from State Criminal Trial in Order to Preserve Safety, Confidentiality, or Well-Being of Witness Who Is Not Undercover Police Officer*, 33 A.L.R.6th 1 (2008).
[100] FINN, *supra* note 7372, at xi.
[101] *Id.* at xi – xii; *e.g.*, David Kocieniewski, *Not Scared, or Scalded, Into Silence, Ex-Gang Leader Takes Stand in Trenton Murder*, N.Y. TIMES, Sept. 28, 2007, http://www.nytimes.com/2007/09/28/nyregion/28gang.html?ref=davidkocieniewski (describing how a former leader of Trenton's Latin Kings gang took stand in murder trial being attacked by another inmate for being a "snitch").

and associates in prisons who will carry out "hits" and beatings as ordered to protect the defendant.[102] Gangs will even target civilian witnesses and police officers, such as ex-officer Richard Elizondo, who in 1998 was shot and paralyzed in an attempted assassination days before he was to testify about a gang-related homicide,[103] or Martha Puebla, who testified for the prosecution in a gang-related double-murder case and was shot multiple times in retaliation a week later.[104]

While sometimes the defendant is directly involved in ordering or causing witness intimidation, [105] it is often difficult to prove that a gang member-defendant directly ordered or perpetrated the intimidation himself.[106] This is because a gang member often benefits from his gang's "no snitch" policy, which is enforced by witness intimidation and the threat of retaliation.[107] The result is that the gang member-defendant may enjoy stalled prosecutions, dropped charges, or no charges at all by virtue of his membership in a gang that intimidates, retaliates against, or murders witnesses who may otherwise be willing to cooperate with police.[108] Fear of a gang's retaliation can silence a witness even if the defendant didn't take any

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[102] *Gangster Menace, supra* note 3130 (explaining that today, much of the violence is dictated by prison gangs that order killings and other crimes from within prison walls).

[103] Dana Bartholomew, *Terror in Our Streets: A Special Report on Gang Violence in Southern California (Targets of Gang Violence)*, L.A. DAILY NEWS, Sept. 29, 2004, http://lang.dailynews.com/socal/gangs/articles/dnp5_main.asp.

[104] Beth Barrett, *Terror in Our Streets: A Special Report on Gang Violence in Southern California (Agony of Victims: Behind Each Tragedy Lie Grief and Heartache of Friends, Family)*, L.A. DAILY NEWS, Sept. 29, 2004 http://lang.dailynews.com/socal/gangs/articles/dnp4_gang4.asp [hereinafter *Agony of Victims*].

[105] *E.g.*, U.S. v. Baskerville, Nos. 07-2927 & 11-1175, 2011 U.S. App. LEXIS 20869, at *2 – 3 (3d Cir. Oct. 13, 2011). Just before William Baskerville, a Newark, New Jersey drug kingpin, was to go to trial on drug charges, the key witness against him was shot and killed by members of Baskerville's "crew." *Id.* Federal prosecutors employed forfeiture by wrongdoing to admit McCray's prior statements, even though McCray was shot by an associate of Baskerville, not by Baskerville himself. *Id.* They were able to do so with evidence that Baskerville actually ordered the member of his "crew" to kill McCray. *Id.* Baskerville was sentenced to life in prison for conspiring to murder a witness, retaliate against a federal informant, and distribute drugs. *Id.*

[106] Smith, *supra* note 5756, at 21 (explaining that witness intimidation is perpetrated not only by defendants but also by their friends or associates, who may employ tactics such as packing the courtroom and staring down everyone in it).

[107] *Id.*

[108] *E.g.*, David Kocieniewski, *Keeping Witnesses Off Stand to Keep Them Safe*, N.Y. TIMES, Nov. 19, 2007, http://www.nytimes.com/2007/11/19/nyregion/19witness.html?ref=davidkocieniewski; David Kocieniewski, *Few*

action. For instance, in the trial of two men charged with the drive-by shooting of an eight-year-old boy, one of the two defendants benefited from a deadlocked jury because some witnesses recanted their testimony and others refused to speak at all out of fear of gang retaliation.[109] As a result, the convicted defendant received a life sentence, while the other smiled as he pleaded no contest to the reduced charge of voluntary manslaughter.[110] When a gang enforces a "no snitch" policy against its own members and civilian witnesses, it substantially interferes with the criminal justice process, terrorizes neighborhoods, and grants a windfall to the defendant by virtue of his membership in a criminal enterprise.

American courts' reliance on live testimony means that live willing witnesses are crucial to the administration of justice,[111] so without those witnesses silenced by gangs, their violent crimes go unpunished. A rule that allows in prior statements of witnesses silenced by gangs might increase conviction rates, specifically in those urban communities where violent crime is currently too expensive and too difficult for law enforcement to address proportionately. Addressing the gang witness intimidation problem will increase the possibility of prosecuting violent gang-member defendants, reducing crime and intimidation in those urban communities that currently suffer from "discriminatory justice" and increasing the effectiveness of prosecution in one class of crimes—violent felonies—that is currently under-prosecuted.

Choices in Shielding Witnesses, N.Y. TIMES, Oct. 28, 2007, http://www.nytimes.com/2007/10/28/nyregion/28witness.html?ref=davidkocieniewski (detailing how, in a quadruple homicide, prosecutors were forced to drop all charges due to the intimidation and murder of witnesses).

[109] *Grieving Mothers*, *supra* note 3534. Five witnesses recanted their statements to police and others refused to testify, which is a common problem among witnesses from the community, according to Deputy District Attorney Anthony J. Falangetti. *Id.*

[110] *Id.*

[111] *See* STUNTZ, *supra* note 8483, at 79.

III: Membership in a Gang that Intimidates: Wrongful Conduct & Evidence of Intent

Successful intimidation or murder of government witnesses by members of a defendant's gang often weakens the government's case and can even force a prosecutor to drop all charges because the hearsay rule generally prevents absent witness statements from being put before a jury.[112] Hearsay[113] is not admissible into evidence unless it falls within delineated exceptions laid out in a jurisdiction's rules of evidence.[114] If a witness becomes unavailable to testify,[115] his testimony will most likely remain subject to the hearsay ban.[116] So if a witness refuses to take the stand, flees the jurisdiction, or dies, it is likely that his prior statements to police or others are inadmissible unless the defendant previously had the opportunity to confront the testimony through cross-examination.

However, there are some narrow exceptions to the hearsay rule,[117] one of which is called "forfeiture-by-wrongdoing." The federal evidence rules[118] and some state codes have adopted this exception,[119] which is also recognized, with slightly different (and narrower) parameters, by

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[112] *E.g.*, FED. R. EVID. 802 (restyled) ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.").

[113] Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. FED. R. EVID. 801(c). The restyled Rules of Evidence define it as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. FED. R. EVID. 801(c)(1)–(2) (restyled).

[114] *E.g.*, FED. R. EVID. 802 (restyled) ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.").

[115] The Federal Rules include examples of unavailability such as a court exemption from testifying due to a privilege, refusal to testify despite a court order, lack of memory of the declarant's statement, unable to testify due to death or infirmity, or absent from the proceedings despite reasonable attempts by the proponent of the statement. FED. R. EVID. 804(a). This list is not exhaustive. STEVEN GOODE AND OLIN GUY WELLBORN III, COURTROOM EVIDENCE HANDBOOK: 2011 – 2012 STUDENT EDITION 333 (West 2011) ("The listed grounds [in 804(a)] are illustrative, not exclusive.").

[116] *See supra* note 112~~102~~.

[117] *See* FED. R. EVID. 804(b)(1)–(6). Five exceptions to the hearsay rule in the case of witness unavailability are included in the Federal Rules of Evidence: prior testimony subject to cross-examination, statement made under belief of impending death, a statement against interest, a statement about the declarant's personal or family history, and, last but not least, forfeiture by wrongdoing. *Id.*

[118] *See* FED. R. EVID. 804(b)(6).

[119] *E.g.*, CAL. EVID. CODE § 1350 (West 2012).

the Supreme Court's Confrontation Clause jurisprudence.[120] The forfeiture-by-wrongdoing exception should be strengthened to combat witness intimidation by a defendant's gang so that a gang member-defendant will not profit at trial from the silence of adverse witnesses. Forfeiture-by-wrongdoing rules should declare that the act of joining a gang with a known history of witness intimidation or retaliation—or the act of remaining a member of a gang that, during the time of membership, regularly utilizes witness intimidation—is sufficient to prove that the gang member-defendant had the requisite intent to silence an adverse witness who was intimidated or killed in the course of gang-related investigation or prosecution.

Forfeiture-by-wrongdoing has its roots in English common law,[121] specifically a 1666 case wherein the fact that the witness was "detained by the means or procurement of the prisoner" constituted a basis to admit the witness's prior testimony.[122] By the time of the founding, forfeiture-by-wrongdoing did not stand alone but was treated as a "species of unavailability" along with death and inability to travel, each of which was grounds to admit prior unconfronted testimony at trial.[123]

The equitable roots of forfeiture-by-wrongdoing are especially salient.[124] The doctrine is not based in principles of agency or waiver, but equity: a man shall not profit by his

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[120] *See generally* Giles v. Cal., 554 U.S. 353 (2008) (representing the Supreme Court's most recent assessment of the doctrine).

[121] *Giles*, 554 U.S. at 359 (referencing Lord Morley's Case, 6 How. St. Tr. 769, 771 (H.L.1666); Harrison's Case, 12 How. St. Tr. 833, 851 (H.L.1692); Queen v. Scaife, 117 Q.B. 238, 242, 117 Eng. Rep. 1271, 1273 (Q.B. 1851); 2 W. Hawkins, Pleas of the Crown 425 (4th ed. 1762); T. Peake, Compendium of the Law of Evidence 62 (2d ed. 1804); 1 G. Gilbert, Law of Evidence 214 (1791)).

[122] *Id.* (quoting *Lord Morley's Case*, at which judges concluded that a witness's having been "detained by the means or procurement of the prisoner" provided a basis to read testimony previously given at a coroner's inquest. 6 How. St. Tr., at 770 – 71).

[123] Rebecca Sims Talbott, Note, *What Remains of the "Forfeitted" Right to Confrontation? Restoring Sixth Amendment Values to the Forfeiture-by-Wrongdoing Rule in Light of* Crawford v. Washington *and* Giles v. California, 85 N.Y.U. L. REV. 1291, 1310 – 11 (2010).

[124] ROGER C. PARK ET AL., EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS 378 (3d ed. 2004). The forfeiture by wrongdoing exception arises not "from a belief that such statements are reliable, but rather from an equitable principle that parties should not be able to benefit from the absence of a declarant whom they made unavailable." *Id.*

wrongdoing.[125] Under forfeiture-by-wrongdoing, a defendant does not voluntarily waive his right to confrontation; rather, "the Rule withdraws the right" in response to the behavior of the defendant.[126] Equitable principles are violated when a gang member-defendant enjoys a windfall because his cohorts, and not he, silence an adverse witness. While procedural safeguards such as permitting depositions and cross-examination by the defense prior to trial may help to safeguard against intimidation by the defendant,[127] the threat of witness intimidation by other gang members would remain, particularly in cases where entire communities are silenced by gang terrorization and control.[128]

A. The Evidentiary Rule

Forfeiture by wrongdoing is codified in Federal Rule of Evidence 804(b)(6).[129] It permits admission of otherwise inadmissible testimony if the witness is unavailable due to the wrongdoing of the either party.[130] The evidence rule is broader than the exception to the constitutional right of confrontation both in what type of statement is admissible and in what

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[125] Giles v. Cal., 554 U.S. 353, 379 (2008) (Souter, J., concurring) (asserting that in the case of a defendant who murdered an adverse witness, "[e]quity demands" a "showing of intent to prevent the witness from testifying" and that the majority opinion supplies the conclusion that "equity requires"); *id.* at 388 (Breyer, J., dissenting) ("The inequity consists of [Giles] being able to *use* the killing to keep out of court her statements against him. That inequity exists whether the defendant's state of mind is purposeful, intentional (*i.e.*, with knowledge), or simply probabilistic.").

[126] Park, *supra* note 124~~14~~, at 378.

[127] *See* D. Michael Risinger & Lesley C. Risinger, *Innocence Is Different: Taking Innocence Into Account in Reforming Criminal Procedure*, 56 N.Y.L. Sch. L. Rev. 869 (forthcoming 2012) (arguing that a defendant's motive to intimidate would be reduced by a procedure allowing for deposition of prosecution witnesses followed by a reasonable opportunity for cross-examination by the defense, "coupled with the understanding that if anything happens to the witness before trial that results in unavailability or substantial change in position, the deposition will be available for use by the jury"). In fact, Marian statutes "directed justices of the peace to take the statements of felony suspects and the persons bringing the suspects before the magistrate, and to certify those statements to the court," and these "confronted statements" were admissible event if the declarant died or was unable to travel to court. *Giles*, 544 U.S. at 359 (citing Crawford, 541 U.S. at 43 – 44; J. Langbein, *Prosecuting Crime in the Renaissance* 10 – 12, 16 – 20 (1974)).

[128] *See, e.g.*, Kocieniewski, *supra* note 15~~14~~; *Witnesses at Risk*, *supra* note 13~~12~~.

[129] *See* FED. R. EVID. 804(b)(6).

[130] *Id.*

must be shown to allow admittance.[131] Congress added this ruleto the Federal Rules in 1997, and, subsequently, a number of states adoptedit.[132] It is applicable to both parties, not just the defendant, and requires that "the party against whom it is offered (1) directly, *or through others*, (2) engaged in conduct that is wrongful (3) with the intent of producing the declarant's unavailability, (4) which was thereby procured," determined in most jurisdictions by a preponderance of the evidence standard.[133] Determinations of whether forfeiture occurred is generally subject to a Rule 104(a)[134] proceeding.[135]

A ruling of forfeiture-by-wrongdoing rule should be attainable by showing of membership in a gang for a sufficient period of time to suggest that the gang member-defendant had knowledge of his gang's intimidation tactics and intended that it put them to use in his favor. To bolster this method of admitting testimony of silenced witnesses, states with a forfeiture-by-wrongdoing exception[136] should add a provision stating that joining or continued membership in a gang with a history of enforcing a "no snitching" policy against witnesses is sufficient evidence of intent to silence any witness against the defendant who is rendered unavailable by the

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[131] It permits admission of testimonial and non-testimonial statements and only requires that the declarant be unavailable due to the defendant's wrongful conduct or his *acquiescence in wrongful conduct* by another party. *Id.* In contrast, there is a specific intent requirement inherent in *constitutional* forfeiture-by-wrongdoing, which only applies to testimonial statements and is not coextensive with the evidentiary forfeiture-by-wrongdoing rule. *Id.*

[132] KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE 442 (6th ed. West 2006)..

[133] *Id.* (emphasis added). However, some states have adopted a heightened "clear and convincing" standard of proof instead. *E.g.*, State v. Mason, 162 P.3d 396, 404–05 (Wash. 2007), *cert. denied*, 553 U.S. 1035 (2008) ("[T]he trial court must decide whether the witness has been made unavailable by the wrongdoing of the accused based upon evidence that is clear, cogent, and convincing. We recognize that this is not an easy standard to meet, but the right of confrontation should not be easily deemed forfeited by an accused."); People v. Geraci, 85 N.Y.2d 359, 367 (1995) (opining that "a defendant's loss of the valued Sixth Amendment confrontation right constitutes a substantial deprivation").

[134] FED. R. EVID. 104(a) ("Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . . [which is] not bound by the rules of evidence except those with respect to privileges.").

[135] GOODE, *supra* note 115~~105~~, at 341.

[136] States that do not have a forfeiture-by-wrongdoing exception are at a great evidentiary disadvantage, because without forfeiture-by-wrongdoing, there is a great incentive for a defendant to render government witnesses unavailable. *See* Giles v. Cal., 554 U.S. 353, 365 (2008) ("The absence of a forfeiture rule covering this sort of conduct would create an intolerable incentive for defendants to bribe, intimidate, or even kill witnesses against them."). The doctrine, even within constitutional parameters, cannot operate without an evidentiary rule in place allowing admittance of otherwise inadmissible statements made by an unavailable witness.

defendant's fellow gang members. In an evidentiary hearing, the court may hear when the defendant joined the gang, the number of years he was a member, and whether he had knowledge of his gang's practice of intimidating witnesses adverse to gang member-defendants. To prove these facts, a prosecutor may need to rely on the testimony of a turncoat gang member who has direct knowledge of the defendant's participation in the gang and of the gang's usual practices. It may also consider call community members or specific witnesses to relate the intimidation practices of the set to which the defendant's belongs. Finally, the prosecutor may call a gang expert to relate the history of the gang and its practice of intimidation, and he can also opine as to whether it is more likely than not that the defendant was aware of the gang's use of intimidation and retaliation and expected that his gang would engage in such tactics in his defense. Finally, the prosecution must offer evidence that a witness is unavailable due to intimidation, homicide, or other means of silencing by members of the gang. The immediate intimidation or murder, an expert's testimony that a gang regularly engaged in witness intimidation, both coupled with evidence that the defendant was a member of the gang during the time that the gang utilized these tactics and expected that his gang would so protect him should be sufficient to satisfy the preponderance of the evidence standard showing specific intent.

Such a rule serves the equities on which the forfeiture doctrine is based by ensuring that a gang member-defendant who knowingly joins a criminal enterprise that intimidates witnesses will not prosper by the wrongdoing of his associates who intimidate witnesses for his benefit. Further, given the high occurrence of witness intimidation by gangs and the broad influence of gangs' "code of silence" over the communities under gang control, this rule would lessen the incentive for gangs to intimidate witnesses on behalf of a gang member-defendant because doing

so would not prevent admission of the testimony. In this manner, it would increase protection of witnesses.

A rule that declares that membership ina gang with a known and enforced"no snitching" policy constitutes sufficient evidence of specific intent to silence adverse witnesses in gang-related trials would pose minimal obstacles for the prosecution to admit non-testimonial statements of those adverse witnesses.[137] These statements are not subject to the constitutional requirement of specific intent put forth in *Giles*.[138] A mere showing of "acquiescence" in making the witness unavailable satisfies the federal rule.[139] Admitting evidence that the gang intimidates, retaliates against, or otherwise enforces a "no snitch" policy against witnesses on behalf of its members along with evidence that the defendant was aware of the "no snitch" policy when he joined or continued membership in the gang is certainly sufficient to show "acquiescense" and likely sufficient to show actual intent. Along with a showing that members of his gang actually did enforce a "no snitch" policy by intimidating or otherwise rendering an adverse witness unavailable is sufficient to satisfy the rule: the defendant's *conduct* was to join and remain an active member of a gang that enforced a "no snitch" policy, which actually *caused* fellow gang members to carry out the "no snitch" policy and intimidate witnesses adverse to him (had the defendant not joined and remained in the gang, his fellow gang members would not intimidate witnesses against him). Finally, the defendant *acquiesced* in the intimidation because he knew and likely expected that that he would receive aid from fellow gang members by means of intimidation tactics if he went to trial.

B. The Sixth Amendment

[137] *See infra* note 161~~150~~ and accompanying text, defining non-testimonial statements.
[138] *Giles*, 554 U.S. at 367.
[139] FED. R. EVID. 804(b)(6).

In some cases, the Confrontation Clause of the Sixth Amendment is a second higher hurdle over which the prosecution must jump before it may invoke forfeiture by wrongdoing.[140] The Founders were not vague in their declaration that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[141] This Sixth-Amendment requirement applies to the states through incorporation of the Fourteenth Amendment.[142] Requiring live witness testimony not only protects the accuracy of the evidence presented to jurors, but it also "ensures a specific trial court process that has unique social value, insisting, with limited exceptions, upon the accused's right to cross-examine witnesses in court."[143] At common law, if a witness was unavailable to testify in court, and if the defendant did not have a meaningful opportunity to cross-examine the witness's statements, then they were inadmissible unless one of two exceptions applied.[144] The first was declarations made by a speaker "on the brink of death and unaware he was dying,"[145] and the second was forfeiture-by-wrongdoing.[146]

The Supreme Court stated in *Reynolds*, the case in which it first recognized the exception,[147] that

> "[t]he constitutional right of a prisoner to confront the witness and cross-examine him is not to be abrogated, unless it be shown that the witness is dead, or out of the jurisdiction of the court; or that having been summoned, he appears to have been kept away by the adverse party on the trial."[148]

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[140] See *infra* text accompanying notes 162~~151~~ – 53.
[141] U.S. CONST. amend. VI.
[142] BROUN, *infra* note 132~~121~~, AT 434.
[143] PARK, *supra* note 124~~114~~, at 414.
[144] *Giles*, 554 U.S. at 358.
[145] *Id.* at 358 – 59.
[146] *Id.* at 359. Note that the common law rules were codified in FED. R. EVID. 804(b), discussed *supra* note 117~~107~~.
[147] *Giles*, 554 U.S. at 366.
[148] Reynolds v. U.S., 98 U.S. 145, 151–52 (1878) (emphasis omitted).

The Court in *Reynolds*, according to the Court in *Giles*, relied on broad principles of forfeiture, but only where the defendant engaged in "wrongful conduct designed to prevent a witness's testimony."[149]

Until recently, the Supreme Court required only that an out-of-court statement by an unavailable declarant bore "adequate 'indicia of reliability'" stemming from a "firmly rooted hearsay exception" or "particularized guarantees of trustworthiness" to pass constitutional muster.[150] The effect was that satisfaction of the hearsay rules indicated that the ConfrontationClause requirements were satisfied.[151] Commentators, most notable Dean Henry Wigmore, agreed that the Confrontation Clause protections operated sufficiently through the hearsay rule and its exceptions.[152] However, in 2004 the Supreme Court dispensed with the "indicia of reliability" scheme when it decided *Crawford v. Washington.*[153] Observing that the Confrontation Clause was intended to combat the use of *ex parte* examinations in favor of English common law's preferred practice of live testimony in an adversarial process,[154] *Crawford* held, after an in-depth historical analysis, that courts should employ a categorical framework: testimonial statements may be "admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[155] Conversely, non-testimonial statements by an out-of-court witness were no longer subject to Confrontation Clause analysis at all.[156]

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[149] *Giles*, 554 U.S. at 366.
[150] Ohio v. Roberts, 448 U.S. 56, 66 (1980).
[151] Park, *supra* note 143~~132~~, at 415.
[152] BROUN, *supra* note 142~~131~~, at 435.
[153] 541 U.S. 36, 58 (2004).
[154] BROUN, *supra* note 142~~131~~, at 437.
[155] *Crawford*, 541 U.S. at 59.
[156] *Id.* at 58.

The Court interpreted the Sixth-Amendment right "to be confronted with the witnesses against him"[157] to apply to "those who 'bear testimony,'"[158] which is a "solemn declaration."[159] The Court set forth a "primary purpose" test to determine whether a statement is testimonial, explaining "[w]ithout attempting to produce an exhaustive classification of all conceivable statements" that testimonial statements are those made with the intent to establish facts relevant to a future prosecution when there is no ongoing emergency.[160] In contrast, non-testimonial statements are those made "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[161] So, in accordance with the Court's interpretation, the right of confrontation requires that testimonial statements—those made outside of emergency circumstances that establish facts relevant to future prosecution[162]—are inadmissible unless offered by the live testimony of the declarant or unless an exception, like forfeiture by wrongdoing, applies.

Forfeiture-by-wrongdoing has most recently been shaped by the Court's decision in *Giles v. California*,[163] in which the Supreme Court set forth a requirement of specific intent.[164] Prior to *Giles*, two distinct lines of cases had developed concerning the doctrine of forfeiture by wrongdoing. In the first, courts required that the defendant act with the specific intent to render a witness unavailable in order to invoke the exception, while in the other the courts were willing

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[157] U.S. CONST. amend. VI.
[158] *Crawford*, 541 U.S. at 51.
[159] *Id.* (quoting 1 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).
[160] Davis v. Wash., 574 U.S. 813, 822 (2006) (Testimonial statements include those "taken by police officers in the course of interrogation . . . when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."); *Crawford*, 541 U.S. at 68 (explaining that statements made in a police interrogation are testimonial, as in the facts of *Crawford*, as well as those made at a preliminary hearing, a grand jury, or a former trial).
[161] *Davis*, 574 U.S. at 822; *Crawford*, 541 U.S. at 51, 56 (including in its description of non-testimonial statements "an off-hand, overheard remark," "a casual remark to an acquaintance," and "business records or statements in furtherance of a conspiracy").
[162] *See supra* note 160~~149~~ and accompanying text.
[163] 554 U.S. 353 (2008).
[164] *Id.* at 367.

to admit evidence even where proof of specific intent was lacking.[165] In *Giles*, the Court approved the former approach, opining that the constitutional doctrine applies to testimonial statements only if the defendant "engaged in conduct *designed* to prevent the witness from testifying"; in other words, the witness must have been 'kept back' or 'detained' by 'means or procurement' of the defendant."[166] Courts have interpreted *Giles* to require a showing that the witness is actually *unavailable*, that the defendant *caused* the unavailability, and that he did so with the *specific intent* to prevent the witness from testifying at trial.[167]

The specific-intent requirement limits the admissibility of unconfronted testimonial out-of-court statements of unavailable witnesses unless the prosecution can show that the defendant intentionally procured the unavailability of the victim.[168] Relying on an in-depth analysis of the forfeiture-by-wrongdoing doctrine at common law and Supreme Court precedent, Justice Scalia opined that "deliberate witness tampering" is the *only* context in which prosecutors have invoked forfeiture by wrongdoing, both at the time of the founding and in subsequent American jurisprudence,[169] and that "without a showing that the defendant intended to prevent a witness from testifying," unconfronted testimony has always been inadmissible at trial.[170] Unlike the federal rule, the constitutional doctrine requires a showing that the defendant had the specific

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[165] Marc McAllister, *Down But Not Out: Why Giles Leaves Forfeiture by Wrongdoing Still Standing*, 59 CASE W. RES. L. REV. 393, 397 (2009). For courts that required specific intent. *see* United States v. Garcia-Meza, 403 F.3d 364, 370-71 (6th Cir. 2005); United States v. Mayhew, 380 F. Supp. 2d 961 (S.D. Ohio 2005); People v. Moore, 117 P.3d 1, 2-3 (Colo. Ct. App. 2004); State v. Meeks, 88 P.3d 789 (Kan. 2004), overruled in part by State v. Davis, 158 P.3d 317 (Kan. 2006); State v. Jensen, 727 N.W.2d 518, 534 (Wis. 2007). For courts that did not require specific intent, *see* People v. Moreno, 160 P.3d 242 (Colo. 2007); Commonwealth v. Edwards, 830 N.E.2d 158, 170 (Mass. 2005); State v. Romero, 133 P.3d 842, 855-56 (N.M. Ct. App. 2006), aff'd, 156 P.3d 694 (N.M. 2007).
[166] *Giles*, 554 U.S. at 359–60.
[167] *E.g.*, Ridgeway v. Superintendent Conway, No. 10-CV-6037 (MAT), 2011 U.S. Dist. LEXIS 92228, at *27–29 (W.D.N.Y. Aug. 18, 2011); People v. Toussaint, No. ST-10-CR-641, 2011 V.I. LEXIS 47, at *7 (V.I. 2011).
[168] *Giles*, 544 U.S. at 367.
[169] *Id.* at 366.
[170] *Id.* at 361.

intent to silence a witness before the prosecution can invoke the doctrine.[171] The rule can make a very big difference in criminal prosecutions: recently, a criminal appeals court overturned the conviction of a man sentenced to death for violently killing his girlfriend because the trial court admitted testimonial statements made by the victim when the prosecution had failed to prove that the defendant killed her with the specific intent to silence her.[172]

Since *Giles v. California*, the Supreme Court requires that the prosecution show that the defendant acted with the *specific intent* to render the witness unavailable in order to admit unconfronted testimonial statements made by an unavailable declarant.[173] In instances where a gang member-defendant's fellow gang members take it upon themselves to prevent witness testimony, the defendant may benefit and even escape prosecution altogether if the prosecution cannot show that the defendant specifically intended to intimidate that witness.[174] Successfully arguing that the decision to join a gang with an enforced "no snitching" policy is sufficient evidence of intent to silence any future witness against the gang member-defendant may lessen the benefit to the defendant garnered merely by virtue of membership in a gang that intimidates witnesses.

Just three years after the adoption of the Sixth Amendment, the Superior Court of Law and Equity of North Carolina stated that the confrontation right was "founded on natural

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[171] *Id.* at 368. While the federal rule permits forfeiture if the defendant "acquiesced in wrongfully causing" a witness's unavailability, FED. R. EVID. 804(b)(6), the Supreme Court made clear in *Giles* that at common law the doctrine of forfeiture by wrongdoing concerned "conduct *designed* to prevent a witness from testifying." *Id.* at 367. Justice Scalia considered "the common law's uniform exclusion of unconfronted inculpatory testimony by murder victims . . . where the defendant was on trial for killing the victim, but was not shown to have done so for the purpose of preventing testimony," to be "conclusive" evidence that a specific intent requirement is proper. *Id.* at 368.

[172] Hunt v. State, 218 P.3d 516, 518 (Okla. Crim. App. 2009) (applying the rule in *Giles* that "where the evidence suggested that the defendant wrongfully caused the absence of the witness, but had not done so to prevent the witness from testifying, unconfronted testimony was excluded unless it fell within the separate common law exception to the confrontation requirement for dying declarations) (citing *Giles*, 554 U.S. at 361).

[173] *Giles*, 554 U.S. at 359–60.

[174] *See, e.g.*, *Witnesses at Risk, supra* note 13~~12~~ (describing examples of gang crimes that remain unsolved or unprosecuted because witnesses are scared to testify).

justice,"[175] notions of which are violated when a gang-member defendant is granted a windfall resulting from the terror that his gang inflicts on adverse witnesses and the community at large. Invoking forfeiture by wrongdoing against a gang member-defendant on the basis of his gang's intimidation practices—if he joined the gang with knowledge of the practices—is consistent with the equitable principles underlying the forfeiture-by-wrongdoing doctrine.[176] Despite this, the holding in *Giles*, on its own, seems to foreclose this option unless the actual "joining" of the gang—or remaining a member knowing that the gang silences witnesses—is the conduct through which intent to silence adverse witnesses manifests.

Direct evidence[177] of a defendant's specific intent is unnecessary to show sufficient proof, even in the wake of *Giles*. The Supreme Court's treatment of forfeiture-by-wrongdoing in domestic violence cases as well as jurisprudence underlying the co-conspirator exception to hearsay suggest that a rule permitting forfeiture when the defendant's gang—not the defendant himself—silences a witness is sufficient under the *Giles* rule.

C. Analogue 1: Domestic Violence & Inferred Intent

In its highly divided opinion, the Supreme Court singled out domestic violence in its discussion of the forfeiture doctrine in *Giles v. California*.[178] Showing particular concern, both Justice Souter in his concurrence and Justice Breyer in his dissent argued that the lack of domestic violence cases at the time of the founding and prior renders Scalia's historical argument concerning specific intent inconclusive.[179] Justice Scalia, writing for the Court, made specific

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[175] State v. Webb, 2. N.C. (1 Hayw.) 103 (1794).

[176] "[T]he rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds." *Crawford*, 541 U.S. at 62; *see also* Reynolds v. U.S., 98 U.S. 145, 158 (1879); *see* PARK, *supra* note 124~~14~~.

[177] Direct evidence is defined as "[p]roof which speaks directly to the issue, requiring no support by other evidence; proof in testimony out of the witness' own knowledge, as distinguished from evidence of circumstances from which inferences must be drawn if it is to have probative effect." BALLENTINE'S LAW DICTIONARY (2010).

[178] 554 U.S. 353, 377 (2008).

[179] *Id.* at 380 (Souter, J., concurring) ("The historical record as revealed by the exchange simply does not focus on what should be required for forfeiture when the crime charged occurred in an abusive relationship or was its

reference in dictum to the possibility of "inferring intent" in the case of an abuser who kills his victim if there is a history of abuse and intimidation intended to prevent his victim from seeking assistance or testifying against him.[180] His oft-cited dictum states:

> Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution -- rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.[181]

In short, Justice Scalia acknowledges that in the case of domestic violence, a history of abuse or threats of abuse is relevant evidence of whether the act of killing his victim was intended to silence her.[182] The Court suggests, by this language, the possibility that a history of abuse or threats of abuse intended to dissuade a victim from speaking to authorities can give rise to an inference that, in the culminating murder, the defendant intended to silence the witness, even if there is no evidence as to the defendant's state of mind at the time of the murder.

Justice Souter, concurring, expressed assent to Scalia's statement and observed that an examination of historical cases and commentary affirms Scalia's conclusion about domestic-violence relationships, noting a derth of "any reason to doubt that the element of intention would

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culminating act; today's understanding of domestic abuse had no apparent significance at the time of the framing, and there is no early example of the forfeiture rule operating in that circumstance."); *id.* at 395–96 (Breyer, J., dissenting) ("We can see from modern cases that this occurs almost exclusively in the domestic violence context, where a victim of the violence makes statements to the police and where it is not certain whether the defendant subsequently killed her to prevent her from testifying, to retaliate against her for making statements, or in the course of another abusive incident. But 200 years ago, it might have been seen as futile for women to hale their abusers before a Marian magistrate where they would make such a statement.") (referencing State v. Rhodes, 61 N.C. 453, 459 (1868) (per curiam) ("We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence.")).

[180] *Id.* at 377.

[181] *Id.*

[182] *Id.*

normally be satisfied by the intent *inferred* on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process."[183] Both Souter and Ginsburg agree, then, that a history of isolation from law enforcement imposed by the abusive defendant can give rise to the inference of specific intent. Justice Souter makes the case succinctly: "If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say, in a fit of anger."[184]

Scalia makes certain that the standard is not "knowledge-based intent,"[185] but something more; however, he does not explicitly foreclose the possibility that inferred intent could arise in a situation other than domestic violence if the requisite relationship and history of isolation and intimidation were present; in fact, he states that the treatment of domestic violence should be the same under *Giles* as any other serious crime,[186] such as gang violence and its resultant witness intimidation and murder. Domestic violence is often described as a unique form of violence wherein one person acts to control another through the use of threats and violence.[187] However, the use of terror and fear to prevent an abused partner (the victim and witness) from seeking the

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[183] *Id.* at 380 (Souter, J., concurring) (emphasis added).
[184] *Giles*, 554 U.S. at 380.
[185] *Id.* at 377 ("This is not, as the dissent charges . . . nothing more than 'knowledge-based intent.'").
[186] *Id.* at 376 ("In any event, we are puzzled by the dissent's decision to devote its peroration to domestic abuse cases. Is the suggestion that we should have one Confrontation Clause (the one the Framers adopted and *Crawford* described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women? Domestic violence is an intolerable offense that legislatures may choose to combat through many means-from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns. But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State's arsenal.").
[187] *E.g.*, Isley Markman, *The Admission of Hearsay Testimony Under the Doctrine of Forfeiture-by-Wrongdoing in Domestic Violence Cases: Advice for Prosecutors and Courts*, 6 CRIM. L. BRIEF 9, 13 (2011) ("The Court's dicta appropriately reflected both the *unique nature of domestic violence* relationships, in which one person acts to control the other, and the reality of domestic violence prosecutions, in which the *only evidence may be statements made by the victim to law enforcement* about prior incidents of domestic abuse that would be considered testimonial and subject to *Crawford*.") (emphasis added).

aid of authorities[188] is not unique. Gangs also utilize terror and fear—in the form of targeted and community-wide intimidation and retaliation—to ensure that gang members and civilians (both victims and witnesses) do not report gang crime to authorities nor testify against gang members in court.[189] Just as an abusive spouse will employ tactics over the course of time designed to isolate his victim and prevent her from reaching out to authorities,[190] so do gang members take action over time designed to prevent entire communities from cooperating with law enforcement.[191] They punish specific witnesses for intimidation and retaliation when those witnesses dare to violate the "no snitching" code.[192] In both cases, showing specific intent to silence a witness can be prohibitively difficult. Witnesses—whether testifying against a domestic-violence abuser or a gang member—are often unavailable because they refuse to testify out of loyalty, will not take the stand for fear of retribution, or are unable to testify because they are murdered. Domestic abusers, in other words, enforce their own "no snitch" policy that silences the key witness to their crimes. Comparatively, gangs with a history of witness intimidation can and do subdue entire communities with violence and threats of violence for reporting crime and cooperating with law enforcement.[193] The dynamics of these relationships are similar, and in neither situation should the defendant profit from the enforcement of the "no snitch" policy by enjoying the terrified (or deathly) silence of an adverse witness in court.

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[188] ELIZABETH M. SCHNEIDER ET AL., DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE 51 (2d ed., Foundation Press 2008) ("Violence need only symbolize the threat of future abuse in order to keep the victim in fear and control her behavior.").

[189] Yee, *supra* note 5049, at 777. ("[D]omestic violence cases are hardly unique . . . in gang cases the accuser may be a fellow gang member, a rival gang member, or a member of the community where gangs have significant power and control . . . [t]he gang member defendant or the defendant's fellow gang members have the power to threaten serious harm, thus intimidating the witness into not cooperating with the state in the prosecution.").

[190] *See* SCHNEIDER, *supra* note 188177, at 52 (observing, in abusive relationships, the development of "a pattern of domination and control by the enforcement mechanism used by the batterer").

[191] *See supra* Part II.

[192] *Id.*

[193] *See supra* Part II.

By sanctioning an inference of specific intent in the domestic violence arena, the Supreme Court leaves open the door for argument that direct evidence is not a requirement for successful invocation of forfeiture. Rather, evidence sufficient to show a history of intimidation with intent to silence suffices. It follows that a showing that the defendant knew of the intimidation practice yet joined or remained an active member of the gang, expected that the practice would be used to his benefit, and proof of intimidation of a witness by the gang, should be sufficient to invoke forfeiture-by-wrongdoing and protect the system of justice on which victims and society relies.

D. Analogue 2: The Co-Conspirator Hearsay Exception, Conspiracy, and Intent

The co-conspirator exception to hearsay is an evidentiary rule that treats as an admission by a party-opponent "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."[194] Forfeiture-by-wrongdoing and the co-conspirator exception to hearsay are "analytically and functionally identical."[195] They are similar in two ways: procedurally, the requirements necessary to invoke forfeiture-by-wrongdoing and the co-conspirator exception to hearsay are by and large the same, and substantively, they are both doctrines that can involve an inference of that a defendant is responsible for the actions or words of another person. Both require a showing of specific intent, and for both, an affirmative finding can rest upon circumstantial evidence. The same degree of evidentiary support that is sufficient to support a conspiracy for the purposes of the co-conspirator exception to hearsay is applicable to forfeiture-by-wrongdoing. These stark similarities suggestthat a gang member-defendant who—in the terminology of conspiracy--"consciously participated" in an organization with a

[194] FED. R. EVID. 801(d)(2)(E).
[195] *U.S. v. Houlihan*, 92 F.3d 1271, 1280 (1912) (citing *U.S. v. Sepulveda*, 15 F.3d 1161, 1180 (1st Cir. 1993), *cert. denied* 512 U.S. 1223 (1994)).

policy of enforcing a "no snitch" policy thereby forfeited his right to cross-examine any adverse witness silenced by his gang on his behalf.

To invoke forfeiture-by-wrongdoing, the proponent must show that the declarant is unavailable due to wrongdoing that the defendant procured or to which he acquiesced,[196] all by, in most circuits, a preponderance of the evidence.[197] If testimonial statements are in question, the proponent must also show that the defendant possessed specific intent to silence the declarant.[198] The proponent of a co-conspirator's statement under Fed. R.Evid. 801(d)(2)(E) must show that a conspiracy existed, the declarant and the defendant were both parties to the conspiracy, and the declarant made the statement in furtherance of the conspiracy.[199] Like forfeiture-by-wrongdoing, all this must be shown under rule 104(a) by a preponderance of the evidence.[200]

For both the co-conspirator exception and forfeiture-by-wrongdoing, the threshold to meet the standard of proof is low and direct evidence is not required, both for practical as well as policy reasons. In the case of forfeiture of confrontation rights,

> [i]t seems almost certain that, in a case involving coercion or threats, a witness who refuses to testify at trial will not testify to the actions procuring his or her unavailability. It would not serve the goal of Rule 804(b)(6) to hold that circumstantial evidence cannot support a finding of coercion. Were we to hold otherwise, defendants would have a perverse incentive to cover up wrongdoing with still more wrongdoing, to the loss of probative evidence at trial.[201]

Similarly, the co-conspirator exception to hearsay is supported by both practical and equitable rationales. Conspiracies tend to be clandestine in nature such that criminal activity is difficult to

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[196] See *supra* text accompanying note 133~~122~~; FED. R. EVID. 804(b)(6).

[197] *See Cotto v. Herbert*, (2nd Cir., 2003), 331 F.3d 217, 235; *U.S. v. Scott*, (7th Cir., 2002), 284 F.3d 758, 762; *U.S. v. Cherry*, 217 F.3d 811, 820 (10th Cir., 2000); *U.S. v. Zlatogur*, 271 F.3d 1025, 1028 (11th Cir., 2001); *see also, Steele v. Taylor*, (6th Cir., 1982), 684 F.2d 1193, 1202 (applying preponderance standard for preliminary findings in forfeiture-by-misconduct cases).

[198] See *supra* text accompanying notes 163~~152~~ and 164~~153~~.

[199] *U.S. v. Houlihan*, 92 F.3d 1271, 1281 (1912).

[200] *Bourjaily v. U.S.*, 483 U.S. 171, 175 (1987).

[201] *U.S. v. Scott*, 284 F.3d 758, 764 (7th Cir. 2002).

prove, often rendering statements by co-conspirators crucial evidence for the prosecution.[202] Further, it is appropriate to burden a conspirator with the "risk that false or inaccurate co-conspirators' statements will be used against that person"[203] once it has been proven by a preponderance of the evidence that he participated in a criminal conspiracy.

Proving that a defendant is party to a conspiracy requires a showing of specific intent.[204] Circumstantial evidence can give rise to a defendant's "conscious participation" in a conspiracy, even if the defendant merely "had some idea of its criminal objectives" without knowing all the details of the crimes involved or other co-conspirators.[205] Neither knowledge of a conspiracy, association with conspirators, nor the defendant's presence at the scene of a criminal act can alone constitute sufficient evidence of intent to participate in the conspiracy.[206] Conspiracies include not only the planning and commission of the substantive crime, but also efforts to evade apprehension and prosecution, such as concealment.

A person need not expressly agree to participate to be party to a conspiracy—actions can imply consent.[207] Further, knowledge of an ongoing conspiracy, while insufficient in itself, can serve as the basis for an inference of specific intent.[208] This informs the forfeiture-by-wrongdoing analysis in that a gang member-defendant who has knowledge of his gang's enforcement mechanisms, yet joins the gang or remains an active participant, and then profits

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[202] RONALD J. ALLEN, ET AL, EVIDENCE: TEXT, PROBLEMS, AND CASES 484 (4th ed. 2006).

[203] *See id.* Another rationale is that co-conspirators are deemed to have authorized statements made by co-conspirators, but it is largely an artificial explanation, *id.*, that rests on principles of agency, which are not implicated in the forfeiture-by-wrongdoing analysis.

[204] Julia N. Sarnoff, *Federal Criminal Conspiracy*, 48 Am. Crim. L. Rev. 663, 671 (2011); *Palmer v. People*, 964 P.2d 524, 527 (Colo. 1998) ("The crime of conspiracy requires two mental states . . . the specific intent to agree to commit a particular crime . . . [and] the specific intent to cause the result of the crime that is the subject of the agreement.").

[205] Sarnoff, *supra* note 204~~193~~, at 671.

[206] *Id.*

[207] *U.S. v. Klein*, 515 F.2d 751, 753 (3d Cir. 1975) (citing *Direct Sales Co. v. U.S.*, 319 U.S. 703, 709 (1943); *U.S. v. Lester*, 282 F.2d 750, 753 (3d Cir., 1960)).

[208] *Direct Sales Co.*, 319 U.S.at 711 ("Without the knowledge, the intent cannot exist."); *Klein*, 515 F.2d at 753 ("Knowledge of the illicit purpose will also serve as the foundation for the required proof of specific intent.").

from the gang's retaliatory practices, can give rise to the inference that he expected and intended for his gang to silence adverse witnesses. Such evidence should be treated as sufficient to show specific intent to procure the unavailability of a witness under a preponderance of the evidence standard.

In addition to the analogous natures of the co-conspirator exception and forfeiture-by-wrongdoing, conspiracy itself has served as an underlying rationale for invocation of forfeiture-by-wrongdoing, even where a defendant was not formally changed with a conspiracy. The Tenth Circuit first addressed the question of whether forfeiture can be enacted by the actions of another person. It held in the affirmative, establishing what is now known as the *Cherry* doctrine. The *Cherry* doctrines relies on the assertion that both the Confrontation Clause and evidence exceptions are met if "the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy."[209] Since then, some circuits have held that "acquiescence" is co-extensive with co-conspirator liability under *Pinkerton* liability[210] for the purposes of forfeiture-by-wrongdoing.[211]

In Cherry, the court allowed forfeiture-by-wrongdoing even while admitting that there was "absolutely no evidence [the defendant] had actual knowledge of, agreed to or participated in the murder of" the declarant.[212] It reasoned that the requirements of conspiracy were met because it was reasonably foreseeable to the defendant that his co-conspirator might silence the witness in furtherance of the conspiracy.[213] Similar to the inference of intent to silence in

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[209] U.S. v. Cherry, 217 F.3d 811, 820 (10th Cir. 2000).
[210] *See* Pinkerton v. U.S., 328 U.S. 640 (1948).
[211] *See* U.S. v. Thompson, 286 F.3d 950 (7th Cir.2002) (adopting the *Cherry* doctrine).
[212] *Cherry* at 814 (quoting *Price*).
[213] *Id.* at 820 (holding that a defendant waives his hearsay objection and confrontation rights if the wrongful procurement of a witness's silence "was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy"). The Seventh Circuit, in adopting the *Cherry* doctrine, relied on a strict interpretation of "reasonably foreseeable"; however, subsequent decisions are apply the "reasonably foreseeable" language less stringently. Adrienne Rose, Note, *Forfeiture of Confrontation Rights Post-Giles:*

domestic violence murders, the court in *Cherry* stated that imputed waiver of confrontation rights under the *Cherry* doctrine may be used to admit hearsay even though the defendant is not convicted of the underlying crime. This is because the standard for showing forfeiture-by-wrongdoing is preponderance of the evidence, while the standard for conviction of the substantive offense is proof beyond a reasonable doubt. Moreover, a prosecutor need not even charge a defendant with a conspiracy in order to utilize the *Cherry* doctrine to admit hearsay.[214]

Application of the *Cherry* doctrine is based on a showing of "acquiescence" by the defendant, not necessarily specific intent. This gives rise to the question of whether the *Cherry* doctrine can survive an analysis under the *Giles* Court's requirement of "specific intent" to silence declarants of testimonial statements. Cases in which a defendant is a member of a gang that enforces a "no snitch" policy—and the defendant can be shown to have both expected to benefit and did benefit from that enforcement—should survive *Giles*, because a showing of specific intent to silence need not be supported by direct evidence but instead can be established by inferences from circumstantial evidence that it is more probable than not that the defendant expected to benefit from the enforcement policy, which should be treated as intent to silence.

In the case of gang-perpetrated witness intimidation, if a gang-member defendant sees his gang defend other members through witness intimidation, knows that they engage in retaliation against witnesses, and yet remains an active member, then when he benefits from that enforcement policy when adverse witnesses in *his* trial are silenced, the preponderance standard can be satisfied.[215] Moreover, it should be satisfied to serve the equities. This outcome will

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Whether a Co-conspirator's Misconduct Can Forfeit a Defendant's Right to Confront Witnesses, 14 N.Y.U. J. Legis. & Pub. Pol'y 281, 302-03 (2011).

[214] Rose, *supra* note 213~~202~~, at 300.

[215] Recall Wigmore's "doctrine of chances" as a means to prove intent, which he explained as "the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all." JOHN H. WIGMORE, THE PRINCIPLES OF JUDICIAL PROOF AS GIVEN BY LOGIC, PSYCHOLOGY, AND GENERAL EXPERIENCE AND ILLUSTRATED IN JUDICIAL

prevent gang member-defendants from profiting from their gang's enforcement of brutal and terrifying "no snitch" policies.

IV: CONCLUSION

The problem of witness intimidation by street and prison gangs is a serious impediment to justice, not only because it can undermine the prosecution of crime but also because it fosters a dynamic of fear and isolation in gang-controlled communities. Gangs have an incentive to silence witnesses because, unless the prosecution can trace the conduct back to the defendant, statements by the unavailable witness are often inadmissible at trial.[216] One means to combat this is to adopt a provision stating that a showing that a defendant in a gang-related trial who joins or continues active membership in a street gang with a history of enforcing a "no snitch" policy against witnesses is sufficient evidence from which a fact-finder may conclude that the defendant specifically intended any resultant intimidation of adverse witnesses against him by his fellow gang members.

TRIALS 133 (Little, Brown, and Co. 1013). By way of example, he described two hunters in the woods, with hunter A walking ahead of hunter B. *Id.* If hunter A hears a bullet whistle past his head once, he is willing to assume hunter B accidently pulled the trigger or aimed poorly. *Id.* But if, soon after, a second bullet goes by, and then a third, which strikes him, hunter A may well assume hunter B intended the shot. *Id.*

[216] *See supra* Part III.