

ORIGINAL

21-5405 ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES

FILED  
AUG 09 2021  
OFFICE OF THE CLERK  
SUPREME COURT, U.S.

GEORGE A. LUNA, Petitioner

v.

ANNA VALENTINE. Warden, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO  
SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR CERTIORARI

George A. Luna  
Petitioner, KSR #222876  
3001 W. Hwy 146  
LaGrange, Kentucky 40032

## QUESTION PRESENTED

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Under Giles v. California can a State constitutionally introduce a murder victim's out of court statements to others about defendant's abuse, pursuant to an "inferred intent" to secure the witness's unavailability under the "forfeiture by wrong doing" exception when there is no evidence of any proceeding that she was going to, or would have been, called as a witness to testify in?

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**LIST OF PARTIES**

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All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

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Petitioner George A. Luna respectfully requests that this Court grant this petition for writ of certiorari to review the Order of the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) below denying Certificate of Appellability (COA) on Luna's Sixth Amendment right to confrontation claim, where reasonable jurists, both of the Kentucky Supreme Court (KSC) in Luna v. Commonwealth, 460 S.W.3d 851 (Ky. 2015) and the California Court of Appeals in People v. Quintanilla, 2020 Cal. App. LEXIS 177 (March 3, 2020) have debated the application of the forfeiture by wrongdoing exception to hearsay as held in Giles v. California, 554 U.S. 353 (2008), and have arrived at opposite conclusions on materially indistinguishable set of facts; and the Sixth Circuit's decision conflicts with Quintanilla as the denial of COA operates as a departure from the accepted and usual course of judicial proceedings as this Court has clearly held in Slack v. McDaniel, 529 U.S. 473 (2000).

OPINIONS BELOW

The February 11, 2021, order of the Sixth Circuit Court of Appeals denial of COA is unpublished and appears at Appendix A to this Petition. On May 18, 2021, the Sixth Circuit denied Luna's petition for rehearing en banc and appears as Appendix E to this Petition. The unpublished opinion of the district court is available at 2020 U.S. Dist. LEXIS 105917 (June 16, 2020), W.D. Ky. and appears as Appendix B to this Petition. The opinion of the KSC is published at 460 S.W.3d (Ky. 2015) and appears as

Appendix D to this Petition.

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**JURISDICTION**

The United States Court of Appeals for the Sixth Circuit entered an Order on February 11, 2021, denying COA. On May 18, 2021, the Sixth Circuit denied petition for rehearing en banc. This Court has jurisdiction under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Sixth Amendment to the United States Constitution states in relevant part: "In all criminal prosecutions, the accused shall enjoy the right.... to be confronted with the witnesses against him." U.S. Const. amend. VI (emphasis added).

The first federal statutory provision, 28 U.S.C. § 2254, provides in relevant part:

(d) An application for writ of habeas corpus ... pursuant to the judgment of a State court shall not be granted ... unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The second relevant federal statutory provision, 28 U.S.C. § 2253(c), provides in relevant part:



(2) A certificate of appealability may issue ... only if applicant has made a substantial showing of the denial of a constitutional right.

#### STATEMENT OF CASE

Luna's Sixth Amendment right to confrontation was violated when the Kentucky state trial court, after the Luna's first conviction was reversed due to inadmissible evidence regarding fires in Illinois, at the second trial allowed the Commonwealth to use the forfeiture by wrongdoing exception to the hearsay rules to backdoor the KSC's admonition that this evidence was not to be reintroduced at the second trial.

At the time of the reversal of the first conviction, Giles was less than two years old.

In the mix of the inadmissible evidence of the Illinois fires with the fire insurance schemes perpetuated by Luna and the victim, were her out-of-court statements to others regarding Luna abusing her, and forcing her to participate in various schemes to defraud her insurance company. Luna, 460 S.W.3d at 867 Luna argued that the statements were inadmissible hearsay. Id. The trial court allowed these statements into evidence pursuant to the "little-used exception to hearsay's general rule of exclusion: ... forfeiture-by-wrongdoing." Id.

The Commonwealth's theory was that Luna killed the victim to keep her from exposing the fire insurance schemes. However, long before the date of her demise, she had already reported her involvement in those schemes to insurance investigators, albeit unbeknownst to Luna. The Commonwealth also theorized that after

Luna killed the victim he set the trailer on fire to cover up the crime.

Luna presented self-protection defense in that he struck the victim in the head with a whiskey bottle only after she had stabbed him and shot at him to repel any further attack.

The jury convicted Luna for murder and first degree arson, the first degree arson and the uncharged crime of first degree robbery were presented as aggravators and he was convicted of first degree robbery as the aggravator with entry of judgment of conviction and life without parole (LWOP) sentence.

Luna's second judgment of conviction was affirmed, 460 S.W.3d at 889, reversed the first degree arson conviction and he is serving a LWOP sentence.

During the course of Luna's federal habeas corpus proceedings, a California Appellate Court in Quintanilla applying Giles to a materially indistinguishable set of facts found, "unconfronted testimony will not be admitted under the forfeiture by wrong doing doctrine 'without a showing that the defendant intended to prevent a witness from testifying,'" Giles, 554 U.S. at 361; "it is not sufficient that defendant caused the declarant to be unavailable; the defendant must have also have intended that result when engaging in the wrongdoing that caused the unavailability." Quintanilla at 17-18. The California appellate court reversed Quintanilla's conviction for murder.

Id. 50

This Court's review is necessary to harmonize the clearly established law of Giles to resolve the contrary decisions of the

Kentucky and California appellate courts, and the Sixth Circuit's conflicting order denying COA regarding the permissible application of the forfeiture by wrongdoing doctrine.

### **Factual Background**

In 2007, Luna was indicted by a Kentucky Marshall County Grand Jury that returned a two count indictment charging him with murder and arson first. Luna was found guilty and the state trial court imposed the jury's recommended life sentence on September 2, 2008.

On November 18, 2010, the Kentucky Supreme Court reversed the judgment of conviction and ordered that Luna be granted a new trial because of a multitude of errors including "it was error to allow evidence of those two prior fires to be admitted in his trial," Luna v. Commonwealth, 2010 Ky. Unpub. LEXIS 103, \*26 (Nov. 18, 2010).

On September 18, 2011, the Commonwealth noticed aggravating circumstances and its intent in seeking a sentence of LWOP. In support it asserted that the murder was committed while Luna was engaged in the commission of first degree arson, and Luna committed the murder while engaged in the commission of first degree robbery.

On March 6, 2012, Luna filed a motion challenging any use of first degree robbery as an aggravator for he had never been charged with first degree robbery. The state trial court denied Luna's challenge on April 3, 2012.

After loss of counsel in early December 2012, Luna was appointed new counsel in late December 2012 - early January 2013.

Trial was reset for February 4, 2013.

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The general theme of the Commonwealth's evidence was that Luna's pursuit of various insurance fraud schemes in which the victim was at most a reluctant participant, and, Luna faced the possibility of multiple criminal sanctions or initiation of criminal proceedings as a direct result of the victim's reporting him, which, "perhaps ... motivated him to kill her, Luna, 460 S.W.3d at 868.

The Commonwealth proceeded to introduce, for sake of brevity, the following statements via testimony of others under the forfeiture by wrongdoing exception: the victim's sister testified that she informed her of various problems she was having with Luna, that he had threatened her, and was overall abusive to her; a friend of the victim testified that she told her that Luna wanted her to report the Firebird on her insurance and that he forced her to drive to Illinois at knifepoint and that he assaulted her by pushing her into a coffee table and potted plant; another friend testified that the victim told him about Luna pushing her into the coffee table and potted plant; yet another friend testified that the victim told her that Luna was dangerous and scared her; a Progressive Insurance agent testified about his conversations with the victim about her insurance claim and her renunciation of that claim; another agent testified that the victim told him that Luna told her to tell the insurance company she was driving the Chrysler; and another agent testified that the victim told that Luna had physically abused her and forced her to drive to Illinois at knifepoint and showed

him a bruise on her arm; a Marshall County Sheriff deputy testified that the victim refused to file charges on Luna regarding the Firebird as she was scared; another officer testified that the victim told him that she had been assaulted by Luna; and another testified that that the victim told him if her trailer were to burn that it was Luna as he had made threats to kill her. Luna, 460 S.W.3d at 867-868.

The evidence Luna presented supported a self-defense theory: Hendrickson became upset when Luna refused to go along with her plan to burn the trailer down. She then stabbed him in the leg with a paring knife, after which Luna retreated to the bathroom, applied a bandage to the wound, and changed jeans. The stabbing was just the beginning, though. When Luna exited the bathroom, Hendrickson had been looking through his cell phone and was now enraged over what she found. Hendrickson struck Luna in the face, bloodying his nose, and grabbed him by the hair. Luna was able to get free and returned to the bathroom to clean up blood yet again. Luna heard Hendrickson yelling she would burn the place down and the click of a lighter. Hendrickson lit candles, wrapped them in an afghan, and dumped vodka all around. This is when she snapped. Hendrickson retrieved a handgun and attempted to fire at Luna, the gun did not fire. Luna went towards her and they struggled over the gun - boom! - nothing but ringing in Luna's ears. All Luna could think about "was not being with his kids, and them growing up without their dad." As he continued to struggle with Hendrickson, Luna grabbed a nearby whiskey bottle Hendrickson had thrown at him earlier. She rose up, yelling "I'm

going to kill you!" The gun went off again. Luna swung the whiskey bottle and connected with the back of Hendrickson's skull. She collapsed to the floor motionless. Luna, 460 S.W.3d at 883.

On February 8, 2013, a jury found Luna guilty of murder and first degree arson. On February 11, 2013, the jury was instructed it could find as an aggravators that the murder was committed while Luna was engaged in the commission of first arson, or the murder was committed while Luna was engaged in the commission of stealing the victim's truck. The jury found, despite no indictment for first degree robbery or any conviction thereon, that Luna did in fact murder the victim during the course of a robbery.

Luna was sentenced to LWOP for the murder and 20 years for the first degree arson.

#### **Proceedings Below**

On direct appeal to the KSC, the Court was none to happy to find "[t]hat we are now dealing with the same Illinois fires we previously held were inadmissible ... is astounding. Luna, 460 S.W.3d at 875.

Addressing the forfeiture by wrongdoing exception the Kentucky Supreme Court admitted that, "[w]e have had little opportunity to mold the scope of the forfeiture by wrongdoing exception. Id. 870 As demonstrated below the Kentucky Supreme Court got this wrong under Giles.

The Court in Luna found Luna's "primary, if not sole, theory of defense was self-defense, i.e. hitting Hendrickson with the

whiskey bottle was justified because he feared for his life. That is consistent with his mind becoming filled with thoughts of his children and dying. If anything, Luna acted with intention in protecting his life. Luna, 460 S.W.3d. at 884 (emphasis added).

The Court went on to state that under the forfeiture by wrongdoing exception, "[h]earsay will be admissible under the rule if offered 'against a party that has engaged in or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.'" The Giles Court even recognized the ... requirement of intent means that the exception applies only if the defendant had in mind the particular purpose of making the witness unavailable." Luna, 460 S.W.3d at 871

Proceeding in error the KSC went on to state, "[t]his discussion is largely philosophical in this case, however, because even if we assume that the Commonwealth has not shown the specific intent of murder for the forfeiture by wrongdoing exception, the evidence is admissible because it is not hearsay.

[ ] By introducing the statements, the Commonwealth was not seeking to prove Luna actually did abuse Hendrickson. The statements were offered, instead, to paint a picture of why Luna may have been motivated to kill Hendrickson or how he planned to commit insurance fraud. As a result, the statements are less like hearsay and more akin to prior-bad-acts evidence offered for 'some other purpose' as allowed [ ]." Luna, 460 S.W.3d at 872 In closing the KSC stated, "[t]he evidence is not, however, unduly prejudicial because it is not unnecessary or unreasonable. [ ]

Luna did not receive a fundamentally unfair trial as a result of the admission of Hendrickson's statements. Id. 873

The KSC affirmed the conviction for murder and aggravated sentence, reversing the first degree arson, conviction with remand for resentencing." Luna, 460 S.W.3d at 889

Having exhausted his State court remedies, Luna filed a petition for writ of habeas corpus in the district court, setting forth several grounds for relief, relevant here:

Luna was denied his Sixth Amendment right to a fair trial, right to confrontation and his Fourteenth Amendment right to due process and equal protection of the law when: the trial court erred to Luna's extreme prejudice in allowing the unduly prejudicial hearsay statements of the deceased to be introduced at trial against him through the "forfeiture by wrongdoing" exception [subcomponents being: a) the Commonwealth failed to prove that Luna engaged in conduct designed to prevent the witness from testifying; b) statements made by deceased to Progressive agents were testimonial in nature; c) statements made to law enforcement officers and dispatch were testimonial in nature; and d) the court failed to consider whether all this testimony was admissible []].

The District Court held, "[t]his is an issue of state law under Kentucky Rules of Evidence. As such this [c]ourt is bound by that finding." DN 33, PID #727 The District Court went on to state, "[t]herefore, even if it was error to admit these statements under the forfeiture by wrongdoing exception, the



evidence was still admissible as it was not hearsay. [] As such, Luna is not entitled to relief." Id., PID #728 Appendix B

Luna filed an application for COA to the Sixth Circuit asserting that, "[r]easonable jurists would debate the District Court decision to affirm the "forfeiture by wrongdoing" exception to hearsay as an independant state evidentiary law ground - when Luna's Confrontation Clause ground was presented to the KSC under Crawford v. Washington, 541 U.S. 36 (2004) which it ignored as prohibited by Early v. Packer, 537 U.S. 3 (2002) by denying Luna's Confrontation Clause claim under an obscure rule nor regularly followed or even known."

The Sixth Circuit in denying COA on this claim stated, "the KSC did not affirm the admission of the victim's statememts on [forfeiture by wrongdoing] ground. Therefore, those arguments do not amount to substantial showing of the denial of a constitutional right." Appendix A, p.3 The Sixth Circuit then stated, "[t]he district court considered the KSC to have "seemingly found [the victim's] statements to be nontestimonial."" If a statement is not made "with the primary purpose of creating evidence for [a] prosecution, they are unlikley to be considered testimonial or violate the Confrontation Clause." Id.

Stumbling right along into the the error of the KSC and District Court, the Sixth Court stated, "[h]ere, the State put forth these statements that Hendrickson made to her sister and friend, to insurance agents and to law enforcement. None of the statements made to her sister, friends, or insurance agents were

even plausibly made to prove something for a later criminal case, and thus, Luna had not made a substantial showing that they are testimonial." Id. P.4 Further, "[a]lthough these statements are more likely than the other to be testimonial, even if their introduction violated the Confrontation Clause, such errors can be harmless. [] Accordingly, Luna has not a substantial showing of the denial of a constitutional right." Ibid.

Luna petitioned for rehearing asserting that the California appellate decision in Quintanilla arrived at by properly application of Giles further substantiated his claim that jurists of reason have debated the issue and arrived at an opposite conclusions from that of the Kentucky Supreme Court and that of the Sixth Circuit, requiring COA to issue on his forfeiture by wrong doing exception claim and violation of his substantial Sixth Amendment right to confrontation.

The Sixth Circuit denied petition for rehearing on May 3, 2021, Appendix D; and denied rehearing en banc on May 18, 2021, Appendix E.

#### REASONS FOR GRANTING THE WRIT

This case presents questions of national importance regarding the prerequisite circumstances necessary before the forfeiture by wrong doing doctrine can be applied to introduce otherwise constitutionally prohibited hearsay statements made to others.

Here the state court held a two day hearing under the Commonwealth's intent to introduce under the forfeiture by wrongdoing exception to hearsay, by the proposition that since

the victim was dead because of Luna, "then perhaps he may have been a reason to kill her," which would permit their introduction this way. Luna, 460 S.W.3d at 868.

The state court permitted this evidence which is set forth in detail, Luna, 460 S.W.3d at 869-870; and on direct Luna argued they could not be so admitted and that these statements were from the beginning inadmissible as argued under Crawford v. Washington, 541 U.S. 36, 68-69 (2004). The KSC on direct spent 12 pages in discussing the issue under the forfeiture by wrongdoing doctrine, not whether the evidence could be admitted under the forfeiture by wrongdoing exception, but to an erroneous departure from Giles absurdly finding that the statements were not hearsay, so whether they were introduced under the doctrine was irrelevant. Luna, 460 S.W.3d. at 872 The KSC ignored the Crawford component to Luna's Sixth Amendment claim.

The state court in Luna permitted Hendrickson's statements to others to be unconstitutionally introduced under the forfeiture by wrongdoing doctrine. Luna's claim must remain to be analyzed under the clearly established law of Giles and Crawford.

The Sixth Circuit also ignored the Crawford component to his Sixth Amendment right "to be confronted with witnesses against him," and proceeded to simply reiterate the KSC factually erroneous conclusion.

During the interim, the California Appellate Court, was faced with a factually indistinguishable summary of that in Luna and addressing under Giles whether evidence of Quintanilla's

physical abuse of the victim that was conveyed to others, could be introduced under the forfeiture by wrongdoing exception, and found that they could not.

As in Luna, the Quintanilla court held a two day hearing under the State's desire to "admit out-of-court statements that Charlene made to friends and family members describing Quintanilla's domestic violence toward her over the course of their relationship." Quintanilla, 2020 Cal. App. LEXIS 177 \*\*\*5 As in Luna, the State court in Quintanilla "concluded that the evidence supported an inference that Quintanilla killed Charlene, at least in part, to prevent her from 'testifying' or 'saying anything at all about' the domestic violence he had inflicted on her. Id.

For all relevant legal purposes the phrases "domestic violence" and "insurance fire fraud schemes/abusive nature" are synomonus.

The Quintanilla Court held: [u]nder the forfeiture by wrongdoing doctrine, a defendant forfeits his Sixth Amendment right to confrony witnesses against him, by a wrongful act, the defendant makes the witness unavailable to testify at trial." At \*\*\*17, citing Giles 554 U.S. at 355

The Quintanilla Court went on to state under the state evidentiary rule that codified the forfeiture by wrongdoing doctrine, which reads verbatim in Luna, found, "it is not sufficient that defendant caused the declarant to be unavailable; the defendant must also have intended that result when engaging in the wrongdoing that caused the unavailability." Id. \*\*\*18

The Commonwealth in Luna and the State in Quintanilla,

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theorized to the jury under the statements made to other, that it could "rely on the inference that because how Quintanilla acted during earlier domestic abuse incident described by witnesses, one of his motives was to prevent her from being a witness. However, ... no substantial evidence supports such a finding."

Id. \*\*\*27

"There was no proceeding against Quintanilla at the time of the killing, in for which Charlene could have been a witness, and there was no evidence that Charlene had threatened to go to the authorities to initiate any such proceeding. With no evidence of a pending or threatened proceeding against Quintanilla where Charlene could be a witness, and no evidence that Quintanilla ever threatended to kill Charlene to prevent her from going to the authorities, it is wholly speculative to infer that Quintanilla killed Charlene, at least in part, to prevent her from being witness merely because of threatening and violent nature of the abusive environment created by Quintanilla.

Quintanilla at \*\*\*28

Here, Luna was never aware that Hendrickson had in fact renunciated her participation in the insurance fire fraud schemes as the evidence states.

The result must arise when Luna and Hendrickson are interposed over Quintanilla and Charlene.

The Quintanilla decision with the proper application of the forfeiture by wrongdoing doctrine to a similar set of facts under Giles shows that jurists of reason have debated this issue and

that KSC got it wrong. The District and Sixth Circuit Court simply proceeded under an impermissible presumption of correctness, that Hendrickson's statements were not hearsay so that it did not matter any way was not constitutional error.

Because Quintanilla reasonably calls into question the Sixth Circuit's denial of COA on this claim under an unreasonable presumption of correctness to the KSC and not whether reasonable jurists would debate this issue as required. This disparity must be addressed as it shows a clear departure from Giles by the KSC and Sixth Circuit in light of Quintanilla as Luna stated to the Sixth Circuit in his petition for re-hearing and en banc.

For if these statements are not hearsay, then they were inadmissible under Crawford as argued on direct to the KSC - a showing of a violation of substantial Sixth Amendment right to Confrontation.


This Court should take this case up to settle Giles to address the conflict in the lower high state courts and the Sixth Circuit.

#### CONCLUSION

For the foregoing reasons, George A. Luna respectfully requests that the Court his petition for writ of certiorari.

Dated: August 10th 2021

Respectfully submitted,

  
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**NOTICE**

Notice is hereby given that the original copy of the petition for certiorari, appendix and motion to proceed in forma pauperis plus (10) copies were mailed postage prepaid this 9 day of August 2021; U.S. Supreme Court Clerk, 1st St. NE, Washington, D.C. 20543-0002.

  
George A. Luna

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the same was mailed postage prepaid this 9 day of August 2021; to the Hon. Gregory C. Fuchs, Counsel for Respondent, 1024 Capital Center Dr., Frankfort, Kentucky 40601-8204.

  
George A. Luna