No. _____

IN THE
Supreme Court of the United States

ARMAND JONES,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Petition for Writ of Certiorari
to the Mississippi Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant forfeits his Sixth Amendment right to confront a witness against him when the defendant did not engage in conduct designed to prevent the witness from testifying but the wrongful act of a codefendant made the witness unavailable to testify?

PARTIES TO THE PROCEEDING

The parties are named in the caption. The Petitioner, Armand Jones, was the Appellant below. The Respondent is the State of Mississippi, Appellee below.

STATEMENT OF RELATED PROCEEDINGS

Trial Court Proceedings

State of Mississippi v. Armand Jones a/k/a A.J Jones, Michael Holland, Sedrick Buchanan, and James Earl McClung, Jr., In the Circuit Court of Leflore County, Mississippi; Cause No. 2016-0063 (the four defendants were tried jointly and the jury verdict was entered on May 18, 2017; the Sentencing Order for Mr. Jones was entered on June 15, 2017).

Appellate Proceedings

All four defendants who were tried together perfected timely appeals to the Mississippi Supreme Court. Initially, the direct appeals were all assigned to the Mississippi Court of Appeals and docketed under a single Case Number, 2017-KA-01053-COA. Eventually, the appeals were divided into three case numbers (with the appeals of Buchanan and Jones remaining under one case number), as reflected below.

James McClung a/k/a James Earl McClung, Jr. v. State of Mississippi, No. 2017-KA-01053-COA; In the Court of Appeals of Mississippi. The Court of Appeals opinion in *McClung* was issued on December 3, 2019, and reversed the conviction and remanded for further proceedings. *McClung v. State*, 294 So.3d 1216 (Miss. Ct. App. 2019), rehearing denied by *McClung v. State*, 2020 Miss. App. LEXIS 182 (Miss. Ct. App. Apr. 28, 2020). The Mandate issued on May 19, 2020.

Michael Holland v. State of Mississippi, No. 2018-KA-00872-COA; In the Court of Appeals of Mississippi. The Court of Appeals opinion in *Holland* was issued on February 4, 2020, and affirmed Holland's convictions. *Holland v. State*, 290 So.3d

754 (Miss. Ct. App. 2020). The Mandate issued on February 25, 2020.

Sedrick Buchanan and Armand Jones a/k/a Armond Jones a/k/a A.J. Jones v. State of Mississippi; No. 2017-KA-01082-COA; In the Court of Appeals of Mississippi. The Court of Appeals opinion in *Buchanan* was issued on December 3, 2019, and affirmed the convictions of both Buchanan and Jones. *Buchanan v. State*, 2019 Miss. App. LEXIS 579, 2019 WL 6490737 (Miss. Ct. App. Dec. 3, 2019), rehearing denied as to Jones by *Buchanan v. State*, 2020 Miss. App. LEXIS 180 (Miss. Ct. App. Apr. 28, 2020), rehearing denied as to Buchanan by *Buchanan v. State*, 2020 Miss. App. LEXIS 181 (Miss. Ct. App. Apr. 28, 2020).

Both Buchan and Jones filed petitions for writ of certiorari to the Mississippi Supreme Court. Both petitions were granted. Writ of certiorari granted as to Jones by *Buchanan v. State*, 303 So.3d 422 (Miss. Oct. 22, 2020). Writ of certiorari granted as to Buchanan by *Buchanan v. State*, 303 So.3d 418 (Miss. Oct. 22, 2020).

On certiorari review, the Mississippi Supreme Court opinion was issued on April 8, 2021. Buchanan's convictions were reversed and rendered. Jones' convictions were affirmed. *Buchanan v. State*, 316 So.3d 619 (Miss. 2021), rehearing denied by *Buchanan v. State*, 2021 Miss. LEXIS 579, 2021 WL 1310276 (Miss. May 27, 2021). The Mandate issued on June 3, 2021.

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Armand Jones, respectfully submits this petition for a writ of certiorari to review the judgment of the Mississippi Supreme Court.

OPINION BELOW

The Mississippi Supreme Court opinion is published at *Buchanan v. State,* 316 So.3d 619; 2021 Miss. LEXIS 93; 2021 WL 1310276 (Miss. 2021). App. at 1-48.

JURISDICTION

The Judgment was entered by the Mississippi Supreme Court on April 8, 2021. App. at 1-48. That court denied Petitioner's Motion for Rehearing on May 27, 2021 (App. at 58), within 150 days of the filing of this Petition. Pursuant to this Court's Order dated March 19, 2020, the deadline for submitting petitions for writs of certiorari was extended to 150 days due to the COVID-19 pandemic. While that Order was rescinded on July 19, 2021, "in any case in which the relevant lower court judgment…or order denying a timely petition for rehearing was issued prior to July 19, 2021, the deadline to file a petition for writ of certiorari remains extended to 150 days from the date of that judgment or order."

The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257(a).

Further, review is proper under Supreme Court Rule 10(c), which provides that certiorari review is considered where "a state court…has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided

an important federal question in a way that conflicts with relevant decisions of this Court."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

The Confrontation Clause of the Sixth Amendment to the U.S. Constitution applies to the states by way of Section 1 of the Fourteenth Amendment to the U.S. Constitution[1], which provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, Section 1.

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[1] *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

STATEMENT OF THE CASE

The Sixth Amendment provides an accused the right to confront and cross-examine his accuser. "[The Confrontation Clause] bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). The Confrontation Clause prohibits admission of testimonial out-of-court statements. If the accused engages in wrongful conduct designed to prevent a witness from testifying, there is a narrow exception to the right of confrontation: forfeiture by wrongdoing. *Giles v. California*, 554 U.S. 353, 367 (2008) (citing *Davis v. Washington*, 547 U.S. 813, 833 (2006)).

Here, Armand Jones was convicted of one count of first-degree murder and three counts of attempted first-degree murder. He was sentenced to life imprisonment for the murder conviction and 30 years imprisonment on each count of attempted first-murder, with all sentences ordered to run consecutive to one another.

Jones was indicted along with Sedrick Buchanan, James McClung, Michael Holland, and Jacarius Keys. Keys was murdered fifteen months after giving a statement to the police that implicated his codefendants, including Jones. Two codefendants (Holland and Buchanan) were suspects in Keys' murder. Jones was incarcerated when Keys was killed. There is no evidence that Jones engaged in any conduct designed to prevent Keys from testifying. Nevertheless, Keys' statement was admitted in Jones' trial, over his objection that this violated his right to confrontation.

This Court has not addressed whether the acts of one that procures the unavailability of a witness can be imputed to his codefendants under a theory of co-conspirator liability. This case presents this Court the opportunity to examine that issue in the context of precedents establishing that forfeiture by wrongdoing is a narrow exception to the fundamental right to confrontation.

A. Factual Background.

On August 15, 2015, Perez Love, D'Alandis Love, Kelsey Jennings, and Ken-Norris Stigler traveled in a red Pontiac on a highway in Leflore County, Mississippi. An SUV pulled alongside the Pontiac and shots were fired from the SUV. The Pontiac crashed into a ditch. The shooting resulted in the death of D'Alandis Love. The remaining passengers suffered bullet wounds and other injuries.

Police recovered both 7.62 mm shell casings and .40-caliber shell casings from the Pontiac. Investigators also recovered two .40 caliber pistols from the Pontiac. One pistol was fully loaded with the safety engaged. The other was missing one round from its magazine. After investigator Bill Staten processed the scene, he collected witness statements. The first came from Jasmine Cage, Perez Love's girlfriend, who was in a separate car. Jones, Keys, Holland, Buchanan, and McClung were developed as suspects. However, Cage later testified that she was too far behind the vehicles to clearly witness the shooting, nor could she clearly see who occupied the SUV.

On September 3, 2015, Keys, accompanied by his attorney, gave a videotaped statement to Staten. Keys said that on the night of the incident, he drove himself, Jones, Holland, and Buchanan to Itta Bena.

Keys placed Jones in the front seat passenger side of the SUV. He stated Jones had his "short" AK-47 rifle with him. Keys said Jones thought he saw the Loves in the red Pontiac and wanted to retaliate against the Loves for "getting" some of Jones' and the codefendants' friends. As the SUV approached the Pontiac, Keys said Jones rolled down the front window, leaned out, and fired at the Pontiac. Jones then yelled, "go, go, go," and Keys drove away. Keys said that Holland arranged a vehicle swap. The group then rented a hotel room. Keys claimed that Jones took his gun inside the room. Keys recalled Jones left and returned, but Jones no longer possessed this gun. Keys' statement was produced to the Defendants in discovery.

Approximately sixteen months after the underlying event and fifteen months after Keys' statement, Keys was shot and killed. Surveillance video implicated Holland and Buchanan. The video showed Holland chasing Keys with a gun while Buchanan served as a lookout. Other people appeared in the surveillance video, but Holland was the only one with a firearm moments before Keys was killed. Jones was not present during Keys' murder because Jones was incarcerated.

No evidence linked Jones to the killing of Keys. No evidence established that Jones, while in jail, communicated with any of his codefendants, including Holland and Buchanan, who were out on bond. There was testimony regarding a single text message that Holland received after Keys was killed. The text said, "This is Sed," indicating it was sent by Sedrick Buchanan. Neither the witness nor the record indicates that the text implicated Jones as being part of Key's death. The only evidence linking

Jones to the after-the-fact, innocuous text message was the contact in the phone, which said only "A.J." The officer who saw the message said it was assumed this meant Jones. At the time the text was sent, Buchanan had been arrested for Keys' killing and was in jail.

No evidence linked the number or cellphone to Jones. No evidenced showed Jones had access to a cellphone while incarcerated, either prior to or after Keys' death. It was not shown that Buchanan had a cellphone that law enforcement assumed belonged to Jones. The record is devoid of any evidence showing contact by Jones with either Holland or Buchanan while Jones was incarcerated.

B. Trial Court Proceedings.

Before trial, Jones filed a motion to exclude Keys' statement. Jones stated that the prosecution had given notice of its intent to introduce the statement. Jones highlighted that Keys was unavailable to testify and that his statement was hearsay. At the hearing on the motion, Jones also argued that admission of the statement would violate his right to confrontation.

The trial court admitted Keys' statement under multiple Rule 804 hearsay exceptions. App. at 50-57. Of particular importance here, the trial court found Keys' statement to be admissible under *Mississippi Rule of Evidence* 804(b)(6) (which resembles the Federal Rule), forfeiture by wrongdoing. Since no Mississippi appellate court had yet interpreted or applied 804(b)(6), the trial court relied on the Rule's comments and federal court decisions.

The trial court adopted the Seventh Circuit's reasoning in *United States v. Thompson*, 286 F.3d

950 (7th Cir. 2002): "waiver-by-misconduct of the right to confront witnesses by one conspirator, resulting from misconduct by that conspirator who causes the witness' unavailability, may be imputed to another conspirator if the misconduct was within the scope and in furtherance of the conspiracy, and was reasonably foreseeable to him." The trial court found sufficient evidence to infer that Jones participated in Keys' killing, even though Jones was incarcerated at the time and there was no evidence that he engaged in any conduct designed to prevent Keys from testifying.

Though the defendants were not charged with conspiracy, the trial court found that it was alleged that they acted in concert with one another. On that basis, the trial court imputed the actions of Holland and Buchanan in procuring Keys' unavailability onto Jones. According to the trial court, Keys' death benefitted Jones as much as the remaining defendants. The trial court admitted Keys' statement against all four defendants, who would be tried together. Various motions to sever were denied.

All defendants were found guilty of various offenses. Jones was found guilty of one count of first-degree murder and three counts of attempted first-degree murder. Following the jury verdict, Jones filed a Motion for Judgment Notwithstanding the Verdict or, in the alternative, a new trial. Jones focused on multiple errors, including the admission of Keys' statement in violation of his confrontation right.

The trial court, in a short order, denied the post-trial motions. Jones timely perfected his appeal to the Mississippi Supreme Court, which assigned the case to the Mississippi Court of Appeals.

C. Appellate Proceedings.

On appeal, Jones asserted that the trial court erred in admitting Keys' statement in contravention of his confrontation rights. The Mississippi Court of Appeals found no Mississippi precedent addressing the imputation of a codefendant's forfeiture by wrongdoing onto a defendant who did not engage in conduct designed to prevent a witness from testifying at trial. The Court of Appeals turned to federal authorities to analyze the issue. *Buchanan v. State*, 2019 Miss. App. LEXIS 579, 2019 WL 6490737 (Miss. Ct. App. Dec. 3, 2019).

In its analysis, the Court of Appeals first relied on this Court's language in *Giles*, 554 U.S. 353: "[Rule 804(b)(6)] applies only when the defendant engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." The Court of Appeals then relied on the conspiratorial liability test established 8 years before *Giles* in the Tenth Circuit's decision in *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000).

Jones argued that because he was incarcerated at the time of Keys' death and no other evidence showed that he took part in Keys' murder, Keys' statement was impermissibly admitted. The Court of Appeals disagreed. The Court recounted the facts presented in *Cherry* and highlighted its established standard: "[a] defendant may be deemed to have waived his or her Confrontation Clause rights (and, a fortiori, hearsay objections) if a preponderance of the evidence establishes [that]…the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy."

The Court of Appeals reached its conclusion after considering the "totality of the circumstances." It explained that Jones' "violent conduct"—as told by Keys—supported that Jones participated in the shooting of the Loves and that there was a plan to "get" the Loves. The Court's factual support derived primarily from the information provided in Keys' statement. The Court of Appeals then noted that Jones and Buchanan were incarcerated together *after* Keys' death. To connect Jones to Buchanan and Holland during Keys' killing, the Court pointed to the text message that was sent to Holland by Buchanan after Keys was killed. The text message, which said nothing about Keys' killing, was assumed to have come from a phone belonging to Jones. Keys' statement was properly admitted, the Court of Appeals ruled.

After denial of rehearing in the Court of Appeals, Jones timely filed a petition for writ of certiorari to the Mississippi Supreme Court. That court granted *certiorari*.

On certiorari review, Jones again challenged the admission of Keys' statement as a violation of his right to confrontation.

The Mississippi Supreme Court began its analysis with *Pinkerton v. United States*, 328 U.S. 640 (1946). App. at 1-48. There, this Court found two defendants were co-conspirators in a crime when one defendant committed the offense in furtherance of the original conspiracy and when the offense was not "merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." The Mississippi Supreme Court then discussed the Tenth Circuit decision, *United States v. Cherry*, 217

F.3d 811 (10th Cir. 2002), where that court held "that the acquiescence prong of *Fed. R. Evid.* 804(b)(6), consistent with the Confrontation Clause, permits consideration of a *Pinkerton* theory of conspiratorial responsibility in determining wrongful procurement of witness unavailability." The court noted that the Seventh Circuit adopted a similar stance by applying *Cherry* in its decision in *United States v. Thompson*, 286 F.3d 950 (7th Cir. 2002).

The Mississippi Supreme Court's navigation through case law ended where it should have started: with a discussion of *Giles v. California*, 554 U.S. 353 (2008). In analyzing *Giles*, the Court focused on this Court's definition of "means" regarding the forfeiture-by-wrongdoing rule. This Court explained that the term could "connote that a defendant forfeits confrontation rights when he uses an intermediary for the purpose of making a witness absent." *Giles*, 554 U.S. at 360.

In applying this assemblage of cases, the Mississippi Supreme Court found sufficient evidence to support that Keys' killing was in furtherance of Jones' conspiracy to kill the Loves and that Keys' death at the hands of Jones' codefendants was reasonably foreseeable to Jones. This reasoning primarily relied on the information provided in Keys' statement. There was no other evidence presented of a "conspiracy" or "plan". The court consistently described case events using Keys' statement. This further underscores the problem that Jones faced: Keys' statement was found to be admissible despite the inability to confront it because, according to that statement alone, there existed an underlying conspiracy.

The Mississippi Supreme Court rejected Jones' argument that Jones could not have conspired with Holland and Buchanan in Keys' killing because he was incarcerated at the time and there was no evidence that he took any action to plan or encourage Keys' killing. The Court relied on this Court's decision in *Pinkerton* and on the Fourth Circuit's decision in *United States v. Dinkins*, 691 F.3d 358 (4th Cir. 2012).

For factual support, the court pointed to the fact that Holland received a text from Buchanan on a phone with the contact identification labeled as "A.J." According to the court, the contact I.D. showing the initials "A.J." was enough to indicate that although incarcerated, Jones somehow remained in contact with Holland and Buchanan via a cellphone that was not linked to him. The Court ignored that the text message at issue was sent *after* Keys died.

The court found that Keys' statement proved that Jones and the other codefendants conspired to kill the Loves, and, in furtherance of that conspiracy, conspired to kill Keys to prevent his testimony. The Mississippi Supreme Court imputed the actions of Buchanan and Holland onto Jones. The Supreme Court affirmed the trial court's decision to admit Keys' statement in the face of Jones' Confrontation Clause arguments. The Court also ruled that, even if admission of the statement was in error, that error was harmless.

Presiding Justice Kitchens filed a concurring opinion. He would have found that the admission of Keys' statement was error, but that the error was harmless. In questioning the rationale of the majority opinion, Justice Kitchens criticized the

reliance on cases that pre-dated this Court's decision in *Giles*, which Justice Kitchen interprets as imposing narrow limits on the forfeiture by wrongdoing exception. *Buchanan*, 316 So.3d at 636.

Justice Kitchens similarly criticized the majority opinion's reliance on the 2001 *Thompson* case from the Seventh Circuit. He explained that the Seventh Circuit recently questioned whether *Thompson* remains viable after *Crawford* and *Giles*:

> The circuit court recognized that *Pinkerton* liability…is a relatively new concept. *Id.* (citing *Pinkerton*, 328 U.S. at 647). The circuit court found that *Pinkerton* liability was not a recognized legal concept at common law or at the time of the founding. "In the 18th century, criminal liability was generally limited to those who acted as principals or those who aided and abetted." *Id.* at 701. The Seventh Circuit said that "[u]nder a strict reading of *Crawford* and *Giles*, it seems that *Thompson* may no longer be good law." *Id.*

Buchanan, 316 So.3d at 636.

Justice Kitchens further reasoned that even under these shaky legal theories, the evidence in this case did not support the imputation of liability for Keys' death onto Jones. There was no ongoing conspiracy to "harm the Loves" and the defendants were not charged with any conspiracy. *Buchanan*, 316 So.3d at 637. Justice Kitchens likewise challenged the conclusion that the killing of Keys 16 months after the underlying allegation and 15 months after Keys gave his statement was reasonably foreseeable to Jones. Finally, he noted

that the majority opinion conflicted with the opinion of the Court of Appeals in codefendant McClung's appeal. In that case, the Court of Appeals reversed the conviction, concluding there was no basis for applying the forfeiture by wrongdoing exception to McClung. *McClung v. State*, 294 So.3d 1216 (Miss. Ct. App. 2019). Justice Kitchens urged that that the same reasoning applied to Jones. *Buchanan*, 316 So.3d at 639-40. However, he believed the error was harmless. *Id.* at 640-41.

The Mississippi Supreme Court opinion was handed down on April 8, 2021. App. at 1-48. Jones timely-filed a Motion for Rehearing, which was denied on May 27, 2021. App. at 58.

REASONS FOR GRANTING THE PETITION

This case presents a question that this Court has never answered: whether the narrow forfeiture by wrongdoing rule can apply when a defendant did not engage in conduct designed to prevent the witness from testifying, but his codefendant did so?

The right of confrontation is "a fundamental right essential to a fair trial in a criminal prosecution." *Pointer v. Texas*, 380 U.S. 400, 404 (1965). This Court has guarded fundamental rights and created high bars for finding that they are waived or forfeited. "There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege." *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (internal quotations and citations omitted).

This case of first impression provides the Court the opportunity to address a sweeping exception to the fundamental right of confrontation. Stripping

that right when that defendant has committed no wrongdoing designed to procure the unavailability of the witness violates the Sixth Amendment. It also creates a broad forfeiture rule that did not exist at the time of the founding, in derogation of the narrow rule authorized by the precedents of this Court.

A. Forfeiture By Wrongdoing is a Narrow Exception to the Fundamental Right of Confrontation

At the beginning of this century, three significant Confrontation Clause opinions were handed down by this Court over a four-year span: *Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 547 U.S. 813 (2006); and *Giles v. California*, 554 U.S. 353 (2008).

In *Crawford*, this Court discussed the core tenets of the Confrontation Clause and the evils it was designed to prevent. A discussion of the history underpinning the Confrontation Clause concluded with two inferences of its meaning. "First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50. This, Justice Scalia reasoned, shows that the primary focus of the Sixth Amendment's right of confrontation was guarding against "testimonial hearsay", including introduction into evidence of "interrogations by law enforcement officers". *Id.* at 53.

The second inference is "that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the

defendant had had a prior opportunity for cross-examination." *Id.* at 53-54. This prohibition creates a narrow and exacting rule. "The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Id.* at 54. Rather, the Confrontation Clause of the Sixth Amendment "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Id.*

Justice Scalia's opinion in *Crawford* concludes: "Where testimonial evidence is at issue…the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68. Put another way, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69.

Two years later, this Court in *Davis v. Washington*, 547 U.S. 813 (2006) examined an issue that was not fully addressed in *Crawford*: categorizing statements as "testimonial" or "nontestimonial". *Id.* at 817. Examination of those definitions is not necessary here, as the statement of Jacarius Keys was unquestionably testimonial. It was an interrogation "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." *Davis*, 547 U.S. at 826.

Davis concludes by addressing concerns that domestic violence cases (such as the two cases addressed in *Davis*) were ripe for abuse by those who would use their right of confrontation as a shield to

avoid conviction by wrongful means (threats, intimidation, etc.) to discourage accusers from testifying. This Court noted that "[w]e may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free." *Id.* at 833.

This Court did, however, identify a historical exception that was available to address these concerns:

> "[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system."

Id. In sum, "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right of confrontation." *Id.*

While not taking a "position on the standards necessary to demonstrate such forfeiture," the *Davis* Court noted that *Federal Rule of Evidence* 804(b)(6) and most courts require prosecutors to meet a preponderance-of-the-evidence standard for the exception to apply. *Id.* The Court noted that proving a defendant procured the absence of a witness would be more difficult than the reliability overruled in *Crawford*. *Davis*, 547 U.S. at 833. But the more rigorous test of forfeiture by wrongdoing could still be used by courts "to protect the integrity of their proceedings." *Id.* at 834.

Two years after *Davis*, this Court turned again to the Sixth Amendment's Confrontation Clause to examine the forfeiture by wrongdoing exception in *Giles v. California*, 554 U.S. 353 (2008). In *Giles*, Justice Scalia framed the question at the outset: "We consider whether a defendant forfeits his Sixth Amendment right to confront a witness against him when a judge determines that a wrongful act by the defendant made the witness unavailable to testify at trial." *Id.* at 355.

In *Giles*, the defendant was charged with murdering his ex-girlfriend. *Id.* at 356. The defendant admitted to shooting her but claimed self-defense. *Id.* To counter this, the prosecution sought to introduce statements the ex-girlfriend had made to a police officer responding to a domestic violence call three weeks before the ex-girlfriend was killed. *Id.* at 356-57. The statements were admitted over objection, and the defendant was convicted. *Id.* at 357. The California Supreme Court affirmed the conviction and ruled that the statements were properly admitted under the doctrine of forfeiture by wrongdoing, as the defendant had made the ex-girlfriend unavailable to testify by killing her. *Id.* This Court granted certiorari to review the issue. *Id.*

The Court began by recognizing that any exception to the right of confrontation must be an exception that was "established at the time of the founding." *Id.* at 358 (citing *Crawford*, 541 U.S. at 54). "We therefore ask whether the theory of forfeiture by wrongdoing accepted by the California Supreme Court is a founding-era exception to the confrontation right." *Giles*, 554 U.S. at 358. The Court then noted that only two such "founding-era" exceptions had been recognized by this Court: (1) "declarations made by a speaker who was both on the

brink of death and aware that he was dying" and (2) statements made by a witness who was "detained" or "kept away" by the defendant, also known as forfeiture by wrongdoing. *Id.* at 358-59 (internal quotations and citations omitted).

"The terms used to define the scope of the forfeiture rule suggest that the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying." *Id.* at 359 (emphasis in original). This Court's historical analysis revealed that "[c]ases and treatises of the time indicate that a purpose-based definition of these terms [i.e., "procure" and "means"] indicate that a purpose-based definition of these terms governed." *Id.* at 360. The examination revealed "no case in which the exception was invoked although the defendant had not engaged in conduct designed to prevent a witness from testifying…." *Id.* at 361. Rather, "[t]he manner in which the rule was applied makes plain that unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying." *Id.* (emphasis in original).

This Court noted that its first dealt with the doctrine in 1879, in *Reynolds v. United States*, 98 U.S. 145 (1879). The *Reynolds* Court acknowledged the doctrine and used it to find no error in the admission of statements by a witness that the defendant was found to have prevented from testifying. As noted by Justice Scalia in *Giles*, *Reynolds* made clear that it was permitting the use of forfeiture by wrongdoing "where the defendant had engaged in wrongful conduct designed to prevent a witness's testimony." *Giles*, 554 U.S. at 366. Further, the *Reynolds* Court "indicated that it was

adopting the common-law rule." *Giles*, 554 U.S. at 366.

With the modern adoption—in 1997—of the forfeiture by wrongdoing hearsay exception in *Federal Rule of Evidence* 804(b)(6), Justice Scalia states that the rule was a codification of the forfeiture doctrine. *Giles*, 554 U.S. at 367 (citing *Davis v. Washington*, 547 U.S. 813, 833 (2006). The scope of the new hearsay rule was clear: "Every commentator we are aware of has concluded the requirement of intent 'means that the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable.'" *Giles*, 554 U.S. at 367 (internal citations omitted). The *Giles* majority rejected the dissenters view that "knowledge is sufficient to show intent" as "*not* the modern view". *Giles*, 554 U.S. at 367-68 (emphasis in original).

In further critique of the dissenting opinion, Justice Scalia described the "narrow forfeiture rule" that the Court was embracing. *Id.* at 373. A broad rule would invite "a principle repugnant to our constitutional system of trial by jury: that those murder defendants whom the judge considers guilty (after less than a full trial, mind you, and of course before the jury has pronounced guilt) should be deprived of fair-trial rights, lest they benefit from their judge-determined wrong." *Id.* at 374.

A broad exception to the fundamental right of confrontation is untenable, even in if it leads to some uncomfortable results. As Justice Scalia noted:

> [T]he guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider "fair." It is not the role of

> courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values. The Sixth Amendment seeks fairness indeed--but seeks it through very specific means (one of which is confrontation) that were the trial rights of Englishmen. It "does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts."

Id. at 375-76 (citing *Crawford*, 541 U.S. at 54).

In *Giles* this Court recognized a narrow, limited exception to the right of confrontation by forfeiture by wrongdoing. It rejected broad, open-ended exceptions in contravention of the limited exception recognized in the founding-era. The narrow rule adopted in *Giles* is focused on intentional wrongful conduct of the defendant that had the particular purpose of procuring the unavailability of the witness. Because the lower courts in *Giles* had not considered intent, the judgment was vacated. *Id.* at 377. Justice Scalia concluded the majority opinion with these words: "We decline to approve an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter." *Id.*

B. The Decision of the Mississippi Supreme Court Conflicts With the Narrow Exception to the Right of Confrontation Announced in *Giles*

In this case, Keys' statement was testimonial. Under this Court's line of cases in *Crawford*, *Davis*, and *Giles*, with Keys not being available to testify at trial, the statement could only be admitted against Jones if there was an opportunity for cross-examination. That opportunity was not present in this case. The statement must then be excluded unless a founding-era exception to the right of confrontation is present. To date, this Court has recognized only two exceptions.

The first exception—a statement by a person on the brink of death who is aware he is dying—is not at issue here. The second exception—forfeiture by wrongdoing—is the sole means by which Keys' statement could be admitted against Jones. Use of the forfeiture by wrongdoing exception in this case conflicts with the narrow rule announced in *Giles*.

The facts of the case show that the underlying event occurred on August 15, 2015. Keys' statement was taken on September 3, 2015. The indictment was filed on July 15, 2016. The indictment was served on Jones on August 15, 2016. At that time Jones was in jail. Keys was killed on December 28, 2016: 16 months after the underlying incident and 15 months after Keys gave his statement. At the time of Keys' death, Jones was still in jail.

There is zero evidence that Jones "engaged in wrongful conduct designed to prevent" Keys from testifying. The evidence shows that five other

persons, including codefendants Holland and Buchanan, were involved in Key's death. Surveillance video evidence placed Holland and Buchanan, both of whom were charged in the same indictment as Jones but were out on bond, near Keys immediately before he was killed. Holland had a gun.

Since he was in jail, it is impossible for Jones to have been physically involved in Keys' death. There is no evidence that he planned, encouraged, or committed any conduct to procure Keys' unavailability. There is no evidence showing that Jones was in communication while in jail with any of his codefendants from the date of his detention up to the killing of Keys. The only evidence of any communication—and it is tenuous at best—is from *after* Keys was killed.

The sole purported connection between Jones and any codefendant implicated in Keys' death was a testimonial description of a text message that an officer says she saw. The actual text message was not admitted into evidence. The testimony regarding the text message is reproduced in full:

> Q: Is there any linkage…between Sedrick Buchanan and A.J. Jones either before or after this crime [the killing of Keys in December 2016] occurred?
>
> A: After.
>
> Q: And tell us about that.
>
> A: One of the suspects in this case had a text message from Mr. Buchanan, and the I.D. on the phone was labeled A.J., *which we assume* is Armand Jones [emphasis added]. His street name is A.J.

> And it said, hey, this is Sed. I don't remember all the details of the text message at this time, but I do remember it said, hey, this is Sed. I don't recall the rest of it.
>
> Q: And when you say one of the defendants, which defendant was that?
>
> A: Michael Holland.
>
> Q: So you have evidence that Michael Holland had a text message on his phone from a number in his phone that indicated it was A.J. Jones?
>
> A: Yes, ma'am.
>
> Q: And the text message contents was something to the effect of this is Sed?
>
> A: Yes, ma'am. And Sedrick Buchanan was arrested [following Keys' death] and in jail at the time that text message came through.
>
> Q: So Sedrick and A.J. would have been in jail together when that text message was received?
>
> A: Yes, ma'am.

***

The Mississippi Supreme Court concluded that the text message "indicates that the men remained in contact even though Jones was incarcerated." *Buchanan*, 316 So.3d at 627. This is not a fair interpretation of the evidence. There is nothing linking this text message to Jones. The linkage was an assumption that a phone contact labeled "A.J." in

Holland's phone was Jones. Even then, the purported substance of the text message (which was not admitted into evidence) was that it was not Jones sending the message, but Buchanan *after* Keys was dead and *after* Buchanan was arrested and jailed. The only content of the message the witness recalled was "this is Sed".

The text message is speculative, unreliable, and legally meaningless. At most, through several factual and logical leaps, the message could show a linkage between Jones and Buchan after Keys was killed, not before. This might impute after-the-fact knowledge on Jones that Keys had been killed. As *Giles* makes plain, knowledge (especially after-the-fact) is insufficient to show intent. *See Giles,* 554 U.S. at 367-68.

There is no evidence—and certainly not evidence sufficient to meet the prosecution's burden—that Armand Jones engaged in any conduct designed to prevent Keys from testifying. That is what *Giles* requires, and Jones' conviction was procured by violation of his right to confrontation.

Recognizing the lack of evidence that Jones engaged in any conduct designed to procure Keys' unavailability, the Mississippi Supreme Court employed another doctrine of forfeiture by wrongdoing: the concept of co-conspirator liability.

This Court has not addressed whether co-conspirator liability can serve as the basis for triggering the rare and narrow exception of forfeiture by wrongdoing. Under *Giles*, forfeiture by wrongdoing can only apply when a defendant engages in conduct designed to prevent a witness from testifying. Intent is crucial. *Giles* is inconsistent

with the concept of co-conspirator liability employed by the Mississippi Supreme Court and the cases it relied upon in reaching its decision.

C. Since Co-Conspirator Liability Was Not Recognized at the Time of Our Nation's Founding It Cannot Be Used as an Exception to the Fundamental Right of Confrontation

This Court made clear in *Crawford* and *Giles* that any exception to the right of confrontation must be one that was "established at the time of the founding." *Giles*, 554 U.S. at 358; *Crawford*, 541 U.S. at 54. See also *Giles*, 554 U.S. at 377 ("We decline to approve an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter."). For co-conspirator liability to be used to allow admission of Keys' statement against Jones, such an exception to the right of confrontation must have existed in the founding-era. It did not.

There is nothing to suggest that, at common law at the time of the nation's founding, a defendant could be held liable for the acts of his co-defendants simply because they were foreseeable to him or advanced the underlying criminal act or coverup.

At least one relatively early English case, albeit after ratification of the Sixth Amendment, seems directly on point. In *Queen v. Scaife, Smith and Rooke*, the Court found:

> [I]f procurement of the absence be shewn, and there are several prisoners, the deposition is evidence against those only who are proved to have procured the absence. And, where the Judge,

> admitting such evidence, left it generally to the jury, and did not point out that it applied only to those implicated in procuring the absence (there being some who were not so implicated), and the latter were convicted, the Court granted a new trial.

Queen v. Scaife, Smith and Rooke, 17 Queen's Bench Reports 238, 117 E.R. 1271 (1851).

The lack of case law regarding co-conspirator liability waiving the right to confrontation is not entirely surprising. *Pinkerton*, after all, was not decided until 1946. *Pinkerton v. United States*, 328 U.S. 640 (1946). At the time of the founding, criminal liability was generally limited to those who acted as principals, aided and abetted, or directly and specifically conspired to commit the specifically indicted offense. *See* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 97-98 (2004) (noting that such broad liability under felony murder rule was the exception at common law).

Indeed, commentary suggests that *Pinkerton* itself was not widely accepted or employed in the years and decades following the *Pinkerton* decision:

> In the years following *Pinkerton*, the decision was 'almost universally condemned by the academic community.' And, although no statistics exist, *Pinkerton* liability appears to have been 'rarely utilized until the 1970's.' Indeed, in 1962 the drafters of the Model Penal Code rejected

> *Pinkerton* liability and by 1972, LaFave and Scott's influential Handbook on Criminal Law declared that the *Pinkerton* rule had 'never gained broad acceptance.'

Alex Kreit, *Vicarious Criminal Liability And The Constitutional Dimensions of Pinkerton*, 57 AM. U. L. REV. 585, 597-8 (2008) (citations omitted).

The fact that multiple courts considered the constitutionality of forfeiture by wrongdoing as a matter of first impression in the 1970s through 1990s suggests that questions of the scope of that waiver are relatively new ones. *See United States v. Carlson*, 547 F.2d 1346, 1358 (8th Cir. 1976) ("Whether the accused waives his right of confrontation under these circumstances is an issue which apparently has not been directly considered by a federal court or, so far as we have been able to ascertain, by any state court."); *United States v. Thevis*, 665 F.2d 616, 627 (5th Cir. 1982) ("a question of first impression in this circuit"); *United States v. Balano*, 618 F.2d 624 (10th Cir. 1979); *United States v. Enright*, 579 F.2d 980 (6th Cir. 1978).

Courts that upheld admission of statements often did so under the residual exception based on indicia of reliability and not as a traditionally established hearsay exception. *See, e.g., Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982) ("although perhaps not admissible under any traditional exception to the hearsay rule, it falls within the broad exception found in *Federal Rule of Evidence* 804(b)(5) permitting a hearsay statement "not specifically covered by any . . . (traditional) exceptions but having equivalent circumstantial

guarantees of trustworthiness, finding forfeiture by wrongdoing).

The extent to which waiver could be imputed to codefendants was also not without controversy. *United States v. White*, 838 F. Supp. 618, 623 (D.D.C. 1993), aff'd, 116 F.3d 903 (D.C. Cir. 1997) ("Mere failure to prevent the murder, or mere participation in the alleged drug conspiracy at the heart of this case, must surely be insufficient to constitute a waiver of a defendant's constitutional confrontation rights. . . . Therefore, [a] particular defendant [must have] participated in some manner in the planning or execution of the murder of [the victim]."); *Olson v. Green*, 668 F.2d 421, 429 (8th Cir. 1982) ("The State has not established that [one defendant] acted on [the other's] behalf or that they acted together to procure [the victim's] silence. Therefore, [one defendant's] conduct intimidating [the victim] into silence may not be attributed to [the defendant] to effect a waiver of [the defendant's] right to confront [the victim].").

One would not expect that a rule "established" at the time of the ratification of the Sixth Amendment would be the product of so much new precedent in the latter part of the twentieth century. *Giles*, 554 U.S. at 367 ("[If] the State's rule had a historical pedigree in the common law or even in the 1879 decision in *Reynolds*, one would have expected it to be routinely invoked in murder prosecutions like the one here.").

Rule 804(b)(6) was codified in 1997, long after ratification of the Sixth Amendment. *Fed. R. Evid.* 804(b)(6), *advisory committee's note*. According to the advisory committee, codification of the rule was necessary in order 'to deal with abhorrent behavior

'which strikes at the heart of the system of justice itself.'" *United States v. Carson*, 455 F.3d 336, 363 (D.C. Cir. 2006) (citing *Fed. R. Evid.* 804(b)(6) advisory committee's note (quoting *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982)).

Importantly, in debating the language of Rule 804(b)(6), the central points of contention seemed to be whether the term "acquiesced" was overly broad and whether the inclusion of that word transformed the concept from one of "waiver" to one of "forfeiture." James Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems with Federal Rule of Evidence 804(b)(6)*, 51 DRAKE L. REV. 459, 476-77 (2003) (describing committee commentary and discussions). Expanding forfeiture by wrongdoing beyond those that personally participated in obtaining a witness's absence represented a break from the relatively limited use of the forfeiture doctrine at common law.

To establish an exception to confrontation at common law "required the witness to have been 'kept back' or 'detained' by 'means or procurement' of the defendant." *Giles*, 554 at 367-68. The means or procurement must be undertaken with the defendant's specific intent of preventing the witness from testifying at trial. *Id.* The twentieth century judicial creation of *Pinkerton* liability runs afoul of that requirement, as this case well illustrates.

Employing *Pinkerton* liability also permits the very scenario that this Court condemned in *Giles*. It puts courts in the role of extrapolating "from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those

underlying values." *Giles*, 554 U.S. at 375. *Giles* decried an interpretation of the Sixth Amendment that would permit "open-ended exceptions from the confrontation requirement to be developed by the courts." *Id.* at 375-76 (citing *Crawford*, 41 U.S. at 54).

Because forfeiture by way of conspiratorial liability—rather than the common law requirement of the intent of the defendant to specifically prevent the witness from testifying—did not exist at the time of the founding, the Sixth Amendment commands that the fundamental right of confrontation be upheld. This Court should grant certiorari in this case to bring clarity to this issue and guard against the expansion of an open-ended, court-created exception to the Confrontation Clause.

D. The Violation of Jones' Right to Confrontation Was Not Harmless Error

Had the Mississippi Supreme Court found Keys' statement inadmissible, both the majority and concurring Opinions state that they would have affirmed Jones' conviction because "even without the admission of Keys' statement, sufficient evidence supports Jones's convictions of murder and attempted murder." *Buchanan*, 316 So.3d at 629, 633 The Mississippi Supreme Court's attempt to cover the violation of Jones' right to confrontation with the cloak of harmless error must fail.

Admitting Keys' statement in violation of the fundamental right to confrontation does not survive the standard established by this Court in *Chapman v. California*, 386 U.S. 18 (1967). Keys' statement detrimentally prejudiced Jones' case because it

cannot be reasonably argued that Keys' damning statement did not contribute to the jury's verdict.

In deciding *Chapman*, this Court affirmed the standard for harmless error that this Court set forth in *Fahy v. Connecticut*, 375 U.S. 85 (1963) and established the bright line rule that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. As this Court said:

> There is little, if any, difference between our statement in *Fahy v. State of Connecticut* about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to *prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained*.

Chapman, 386 U.S. at 24. (emphasis added).

The Mississippi Supreme Court reasoned that remaining witness testimony would have led to the jury convicting Jones beyond a reasonable doubt. That court stated that because other witnesses identified Jones during testimony, evidence supported Jones' conviction without the help of Keys' statement. However, the court erroneously focused on whether the jury still could have found Jones guilty without the admission of Keys' statement.

The Mississippi Supreme Court should have focused on what this Court emphasized in *Chapman*: "Under these circumstances, it is completely impossible for us to say that the State has

demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction *did not contribute* to petitioners' convictions." *Id.* at 26. (emphasis added).

The standard for harmless error under *Chapman* is not as lax as the Mississippi Supreme Court implies. This Court's precedent does not support the proposition that harmless error analysis centers on whether the defendant would be convicted without the evidence. Rather, this Court's precedent requires that error is not harmless if the evidence admitted in violation of a constitutional right contributed to the conviction.

Applying the *Chapman* standard appropriately, Keys' statement unquestionably contributed to Jones' conviction. First, the Mississippi Supreme Court's focus on other witness testimony ignores the collective uncertainty that surrounded identifying the occupants of the shooting vehicle. Jasmine Cage identified Jones in her initial statement, but she could not remember at trial what her initial statement said. In her trial testimony, she admitted that she could not see who was inside the car and she was uncertain of who was in it. More importantly, she repeatedly says who she "thinks" was in the car.

Other witnesses mimicked Cage's ambiguities. For instance, the Mississippi Supreme Court pointed to Perez Love's testimony in the harmless error analysis. But the court failed to acknowledge that Perez Love was under the influence of drugs administered to him for his surgery at the time he gave his statement. Some of the information that he provided was false. In fact, Love recanted some statements on the witness stand but let other parts stand (including his implication of Jones). A jury

could have reasonably questioned whether the portions of Love's statement regarding Jones were accurate because they were also made while Love was under the influence.

These doubts become more reasonable when combined with other witness testimony. For example, Cage—Perez's girlfriend–expressed in her statement that Jones and the Loves were "into it," meaning they disliked one another. Similarly, witness Ken-Norris Stigler testified over an overruled objection that he and Jones had terminated their prior friendship because Stigler believed Jones killed his cousin. In short, all testimony used to implicate Jones was subject to great question both because of inconsistencies and previously existing bias or dislike against Jones.

Yet, these witnesses were pivotal in the Mississippi Supreme Court's finding of harmless error. The State's evidence absent Keys' statement was untrustworthy, as was the reasoning of the jury that convicted Jones. This is underscored by the fact that the convictions of two of Jones' codefendants (Buchanan and McClung) were reversed on appeal. *See Buchanan*, 316 So.3d at 632; *McClung*, 294 So.3d at 1233. It cannot be said with confidence that the same jury fairly considered Jones' case when his conviction was obtained in violation of a fundamental constitution right.

The burden of showing harmless error is on the beneficiary of the error. *Chapman*, 386 U.S. at 24 ("It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment."). The State cannot show that

admitting Keys' statement caused no injury to Jones because the record supports that the State needed it to secure a conviction.

Error cannot be harmless when dealing with "constitutional errors that 'affect substantial rights' of a party." *Id.* at 23. "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless." *Id.* at 23-24. The Mississippi Supreme Court's decision violates Jones' fundamental right to confrontation.

The Mississippi Supreme Correct erred by allowing admission of Keys' statement and by ignoring the obvious prejudicial effect of Keys' statement. It is inconsequential that the State presented other evidence that the court found could still convict Jones. Keys' statement—admitted in violation of the fundamental right to confrontation—contributed to the verdict. This grave constitutional error was not harmless.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 25, 2021

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2017-CT-01082-SCT

SEDRICK BUCHANAN AND ARMAND JONES a/k/a ARMOND JONES a/k/a A.J. JONES

v.

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI

DATE OF JUDGMENT: 06/15/2017

TRIAL JUDGE: HON. W. ASHLEY HINES

COURT FROM WHICH APPEALED: LEFLORE COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANTS:
DAVID P. VOISIN
M. KEVIN HORAN
BRADLEY D. DAIGNEAULT

ATTORNEY FOR APPELLEE:
OFFICE OF THE ATTORNEY GENERAL
BY: BARBARA BYRD

DISTRICT ATTORNEY: WILLIE DEWAYNE RICHARDSON

NATURE OF THE CASE: CRIMINAL – FELONY

DISPOSITION: AFFIRMED IN PART; REVERSED AND RENDERED IN PART - 04/08/2021

MOTION FOR REHEARING FILED:

MANDATE ISSUED:

EN BANC.

GRIFFIS, JUSTICE, FOR THE COURT:

¶1. In this certiorari case, we must determine whether the testimonial statement of an unavailable witness may be introduced against a defendant under Mississippi Rule of Evidence 804(b)(6), otherwise known as the forfeiture-by-wrongdoing hearsay exception. Because the record shows that Armand Jones forfeited by wrongdoing his constitutional right to confront the witness, we affirm his convictions of murder and attempted murder. But because there was insufficient evidence presented to support Sedrick Buchanan's convictions of aggravated assault, we reverse and render a judgment of acquittal as to Buchanan.

FACTS AND PROCEDURAL HISTORY

¶2. On August 15, 2015, at approximately 11:00 p.m., D'Alandis Love, Perez Love, Kelsey Jennings, and Ken-Norris Stigler were traveling west on Highway 82 in a red Pontiac headed to the Moroccan Lounge, a club in Itta Bena. As they were driving, a gold Tahoe approached and opened fire on their vehicle. D'Alandis Love was killed. Perez Love, Jennings, and Stigler were seriously injured.

¶3. Bill Staten, an investigator with the Leflore County Sheriff's Department, responded to the scene. He examined the Pontiac and noticed that the rear passenger window had been shot out and that there were bullet holes along that particular side of the vehicle. Investigator Staten took photographs and collected evidence, including multiple 7.62 mm shell casings and one .40-caliber shell casing. He also recovered one .40-caliber pistol in the vehicle.

¶4. Amber Conn, a crime-scene analyst with the Mississippi Bureau of Investigation, also examined the Pontiac. According to Conn, the vehicle was shot from the back toward the front. During her investigation of the vehicle, Conn recovered another .40-caliber pistol located on the front passenger floorboard. The pistol was fully loaded, and its safety was locked.

¶5. Lisa Funte, the State's medical examiner, opined that D'Alandis Love died as a result of multiple gunshot wounds. According to Funte, the manner of his death was homicide.

¶6. Jones, Buchanan, Michael Holland, Jacarius Keys, and James Earl McClung, Jr., were developed as suspects in the shooting. On September 3, 2015, Keys, accompanied by his attorney, went to the Leflore County Sheriff's Department and gave a statement to Investigator Staten. Keys's statement, which was videotaped, implicated Jones, Holland, Buchanan, and McClung in the shooting.

¶7. Keys, Jones, Holland, Buchanan, and McClung were later indicted and charged with one count of

first-degree murder and three counts of attempted first-degree murder. Approximately five months after the men were indicted, Keys was shot and killed. Holland and Buchanan were considered suspects in Keys's death. It is undisputed that at the time of Keys's death, Jones was incarcerated.

¶8. Before trial, Jones, Holland, Buchanan, and McClung moved to exclude Keys's videotaped statement based on hearsay and the Sixth Amendment Confrontation Clause. The trial court denied the motion and allowed the statement to be admitted into evidence under Mississippi Rules of Evidence 804(b)(3) (the statement-against-interest hearsay exception), 804(b)(5) (the catch-all hearsay exception), and 804(b)(6) (the forfeiture-by-wrongdoing hearsay exception). The defendants further moved to sever their cases. That motion was denied.

¶9. Additionally, before trial, Buchanan moved to exclude testimony and evidence related to his postshooting arrest. After Buchanan was arrested for the shooting but while he was out on bond, a .40-caliber pistol was found in a vehicle in which he was a passenger. The pistol was located beneath the center console between the driver's seat and front passenger seat. The vehicle in which the pistol was found was owned by Buchanan's friend, Danarius Jackson. The .40-caliber pistol found in the vehicle was purchased by and registered to Jackson. The trial court found that Buchanan's pretrial motion was premature and should be raised at trial.

¶10. At trial, the State presented multiple witnesses including Starks Hathcock, an expert in firearms and toolmarks identification. Hathcock examined the .40-caliber pistol found in Jackson's vehicle but was unable to positively determine whether the gun fired the .40- caliber shell casing recovered at the scene of the shooting. Nevertheless, the pistol was admitted into evidence over Buchanan and Jones's objection.

¶11. Also at trial, Keys's videotaped statement was presented to the jury. This statement is discussed in more detail below.

¶12. Jones, Holland, Buchanan, and McClung were all convicted of various offenses. Relevant to this appeal, the jury found Jones guilty of first-degree murder regarding D'Alandis Love and guilty of three counts of attempted first-degree murder regarding Perez Love, Jennings, and Stigler. Jones was sentenced to serve life in prison for his murder conviction and thirty years for each attempted-murder conviction.

¶13. The jury acquitted Buchanan of the first-degree murder of D'Alandis Love but found Buchanan guilty of the lesser-included offenses of aggravated assault with respect to Perez Love, Jennings, and Stigler. Buchanan was sentenced to serve three consecutive terms of twenty years for each aggravated-assault conviction.

¶14. Jones and Buchanan filed motions for judgment notwithstanding the verdict and for a new trial, which the trial court denied. Jones and Buchanan

timely appealed, and each asserted numerous assignments of error.

¶15. On appeal, the Court of Appeals affirmed Jones's and Buchanan's convictions. ***Buchanan v. State***, No. 2017-KA-01082-COA, 2019 WL 6490737, at *24 (Miss. Ct. App. Dec. 3, 2019). The court concluded that the trial court did not err by admitting Keys's statement into evidence under Rule 804(b)(6), the forfeiture-by-wrongdoing exception. ***Id.*** at *9, *10. The court found that sufficient evidence was presented "to reasonably infer a conspiracy at least between Jones and Holland to kill or harm the Loves and that Keys's murder was in furtherance and within the scope of that conspiracy." ***Id.*** at *12. The court determined "that Buchanan engaged in or acquiesced in the wrongdoing that was intended to, and did, procure Keys's unavailability" and "that Holland and Buchanan's waiver-bymisconduct c[ould] be imputed to Jones[.]" ***Id.*** at *9, *10. The Court of Appeals found no merit in Jones's argument that Keys's statement should have been excluded as self-serving. ***Id.*** at *12

¶16. Regarding Buchanan's specific assignments of error, the Court of Appeals found that sufficient evidence was presented to support Buchanan's convictions of aggravated assault. ***Id.*** at *18-20. The court also found that the trial court did not abuse its discretion by allowing the .40-caliber pistol recovered during Buchanan's postshooting arrest and the related testimony into evidence. ***Id.*** at *15.

¶17. Jones and Buchanan filed separate petitions for certiorari. This Court granted both petitions. In his

petition, Jones argues that the trial court erroneously admitted Keys's videotaped statement under Rule 804(b)(6). Buchanan also raises this argument but asserts two additional arguments: (1) the trial court erroneously admitted evidence regarding a .40 caliber pistol recovered during his postshooting arrest, and (2) insufficient evidence supports his convictions of aggravated assault.

ANALYSIS

I. Armand Jones

A. Admission of Keys's Videotaped Statement

¶18. Jones first argues that the trial court erroneously admitted Keys's videotaped statement under Rule 804(b)(6), the forfeiture-by-wrongdoing hearsay exception. "Our standard of review regarding admission or exclusion of evidence is abuse of discretion." ***Jenkins v. State***, 102 So. 3d 1063, 1065 (Miss. 2012) (internal quotation marks omitted) (quoting ***Smith v. State***, 25 So. 3d 264, 269 (Miss. 2009)). "Constitutional issues are reviewed de novo." ***Id.*** (citing ***Smith***, 25 So. 3d at 269).

¶19. Both the United States Constitution and the Mississippi Constitution guarantee a defendant in a criminal prosecution the right to confront the witnesses against him. U.S. Const. amend. VI (applicable to the states through U.S. Const. amend. XIV); Miss. Const. art. 3, § 26. The United States Supreme Court has held that a testimonial statement of a witness absent from trial should be admitted only when the witness is unavailable and

when the defendant has had a prior opportunity to cross-examine the witness. ***Crawford v. Washington***, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). But a defendant's right to confront the witnesses is not unlimited and is subject to two clear exceptions.

¶20. An unavailable witness's unconfronted testimonial statement is admissible if (1) the "declarations [were] made by a speaker who was both on the brink of death and aware he was dying" or (2) the witness "was 'detained' or 'kept away' by the 'means or procurement' of the defendant." ***Giles v. California***, 554 U.S. 353, 358-59, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008). The second exception for admissibility is otherwise known as "forfeiture by wrongdoing." ***Id.*** at 359.

¶21. A party "who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." ***Davis v. Washington***, 547 U.S. 813, 833, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); *see also* ***Crawford***, 541 U.S. at 62 ("[T]he rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds . . . ."). Likewise, under Rule 804(b)(6), a party forfeits his rights to object to a prior testimonial statement on hearsay grounds if the party "wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result." MRE 804(b)(6); MRE 804(b)(6) advisory comm. note.

¶22. In ***Pinkerton v. United States***, Daniel and Walter Pinkerton were convicted of crimes related to

the unlawful possession and transportation of whiskey in violation of the internal revenue code. ***Pinkerton v. United States***, 328 U.S. 640, 648, 66 S. Ct. 1180, 1184, 90 L. Ed. 1489 (1946). The evidence showed that Walter had acted alone to commit the substantive crimes and that Daniel was actually in the penitentiary when some of the crimes were committed. ***Id.*** at 647-48. Nevertheless, the Court found that the government had presented sufficient evidence to show that at the time the offenses were committed, the brothers were parties to an unlawful conspiracy and that the substantive offenses were committed in furtherance of that conspiracy. ***Id.*** Specifically, the Court found that the substantive offenses committed by one of the conspirators were done in furtherance of the conspiracy, fell within the scope of the unlawful project, and were not "merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." ***Id.***

¶23. In ***United States v. Cherry***, the United States Court of Appeals for the Tenth Circuit found that "***Pinkerton***'s formulation of conspiratorial liability [wa]s an appropriate mechanism for assessing whether the actions of another can be imputed to a defendant for purposes of determining whether that defendant has waived confrontation and hearsay objections." ***United States v. Cherry***, 217 F.3d 811, 818 (10th Cir. 2000).[1] The court concluded "that the acquiescence prong of Fed. R. Evid. 804(b)(6), consistent with the Confrontation Clause, permits

[1]Decisions of federal appellate courts are persuasive, not mandatory, authority and are not binding on this Court.

consideration of a *Pinkerton* theory of conspiratorial responsibility in determining wrongful procurement of witness unavailability . . . ." *Id.*

¶24. Under *Cherry*,

> [a] defendant may be deemed to have waived his or her Confrontation Clause rights . . . if a preponderance of the evidence establishes one of the following circumstances: (1) he or she participated directly in planning or procuring the declarant's unavailability through wrongdoing; or (2) the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy[.]

Id. at 820 (citations omitted). The court clarified that "the scope of the conspiracy is not necessarily limited to a primary goal—such as bank robbery—but can also include secondary goals relevant to the evasion of apprehension and prosecution for that goal—such as escape, or, by analogy, obstruction of justice." *Id.* at 821.

¶25. Two years later, in *United States v. Thompson*, the United States Court of Appeals for the Seventh Circuit considered the *Cherry* conspiratorial responsibility test and recognized that "acts taken to prevent apprehension" including "[w]itness tampering . . . can constitute waiver-by-misconduct." *United States v. Thompson*, 286 F.3d 950, 964 (7th Cir. 2002) (citations omitted).

¶26. The United States Supreme Court addressed the forfeiture-by-wrongdoing exception in ***Giles***. ***Giles***, 554 U.S. at 359. The Court explained that the forfeiture-by-wrongdoing exception "permitted the introduction of statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant." ***Id.*** The Court further explained that "[t]he terms used to define the scope of the forfeiture rule suggest that the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying." ***Id.*** The Court recognized that the term "means" could "connote that a defendant forfeits confrontation rights when he uses an intermediary for the purpose of making a witness absent." ***Id.*** at 360 (internal quotation marks omitted). While forfeiture by wrongdoing was not an exception established at the time of the founding, the Court acknowledged that under Federal Rule of Evidence 804(b)(6), the forfeiture-by-wrongdoing exception applies when the defendant "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." ***Id.*** at 366, 367 (internal quotation marks omitted) (quoting Fed. R. Evid. 804(b)(6)). The Court noted that "[e]very commentator [it] [was] aware of has concluded the requirement of intent 'means that the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable.'" ***Id.*** at 367 (quoting 5 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8.134 (3d ed. 2007)).

¶27. Here, the record reflects that sufficient evidence was presented to show that Jones conspired to kill

the Loves and that Keys's murder was in furtherance and within the scope of that conspiracy and reasonably foreseeable to Jones. ***Cherry***, 217 F.3d at 820. Thus, Holland's and Buchanan's actions in Keys's death can be imputed to Jones, thereby waiving Jones's Confrontation Clause rights. ***Id.*** at 818, 820. Indeed, the record reflects that Jones "ha[d] in mind the particular purpose of making [Keys] unavailable." ***Giles***, 554 U.S. at 367 (internal quotation mark omitted) (quoting Mueller & Kilpatrick, *supra*, at § 8.134)

¶28. In his statement, Keys explained that on the night of the shooting, he was with Jones, Holland, McClung, and Buchanan at Holland's house. According to Keys, days earlier Jones had stated that he needed to "get one" of the Loves because they had "got some of their friends."[2] The group decided to go to the Moroccan Lounge in Itta Bena, and all five men got into Keys's Tahoe. Keys stated that Jones had his "short" AK-47 assault rifle with him when they left Holland's house.

¶29. On their way to the club, Keys was driving, Jones and Holland were on the passenger side of the vehicle, McClung was in the back seat on the driver's side, and Buchanan was in the third-row seat. While traveling on Highway 82, they approached a red Pontiac. Jonesmentioned that it looked like the Loves in the vehicle. As they approached the vehicle, Jones rolled down the window, leaned out the window, and opened fire. As soon as Jones started

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[2] According to Keys, the Loves had recently shot two of their friends.

shooting, he yelled, "go, go, go," and Keys sped up to get away.

¶30. After the shooting, Keys stated that Holland made a phone call and arranged for them to swap cars. After they had swapped cars, they went to a Best Western hotel in Greenwood and got a room. Jones brought his gun into the hotel room. Later, Jones and Holland left together. According to Keys, Jones returned around 3:00 or 4:00 a.m., and he no longer had his gun.

¶31. Keys, Jones, Buchanan, and McClung spent the night at the Best Western. The next morning, Jones arranged his own ride home; Keys, McClung, and Buchanan all got a ride together. Keys was dropped off first.

¶32. Keys explained that when he woke up at the hotel that morning, he had a number of missed calls. He called his mother and learned that the sheriff was looking for him. Keys told his mother that something had happened, but he did not tell her the details. Keys stayed with his mother for several days after the shooting until he retained counsel and turned himself in. At the time Keys gave his statement, he had not spoken with anyone else who had been involved in the shooting.

¶33. Jones asserts that because the victims were traveling in a borrowed vehicle[3] at the time of the shooting, there could be no plan or conspiracy to

[3] Bentravious "Munchie" Brown testified that on the night of the shooting, he loaned his red Pontiac to Perez Love.

shoot or kill them. He further asserts that Keys's statement contradicts a conspiracy to shoot or harm the Loves. But the record reflects that the shooting was not a random act. Instead, it shows that Jones planned and conspired to shoot the Loves out of revenge for their recently having shot two of his friends. The fact that the victims were in a borrowed vehicle is irrelevant. Indeed, the record shows that as they approached the borrowed vehicle, Jones stated that it looked like the Loves in the car. Jones then opened fire on the Loves. While Keys did not indicate that there was a plan to kill the Loves, he stated that Jones had said just days earlier that he wanted to "get" the Loves because of what they had done to their friends.

¶34. Additionally, although Keys stated that no one else had a gun except for Jones, two of the surviving victims testified that both Jones and Holland had shot at them and that Holland had used a .40-caliber pistol. A .40-caliber shell casing was recovered from the scene, and a .40-caliber bullet was recovered from Perez Love's head.[4] Thus, the record reflects that on the night of the shooting, upon leaving Holland's house, both Jones and Holland were armed with guns and used those guns to shoot the Loves.

¶35. After giving his statement, Keys went to Jones's lawyer and advised that he had given a statement to law enforcement. Each defendant was provided a copy of Keys's statement early in the case. Approximately five months after the men were

[4] Expert testimony showed that the .40-caliber bullet was not fired from the two pistols found in the Pontiac.

indicted, Keys was shot and killed. The surveillance video shows Holland chasing Keys through a parking lot—while carrying a gun—moments before Keys was shot and killed. Although other people appeared on the video, and even chased behind Keys and Holland, Holland was the only person with a gun. The surveillance video further shows Buchanan acting as a lookout.

¶36. Jones asserts that "[d]ue to his incarceration, it would have been impossible for [him] to have [had] any involvement with . . . Keys's death." We disagree. The fact that Jones was in jail at the time of Keys's murder is of no consequence. ***Pinkerton***, 328 U.S. 640, 647-48; *see also* ***United States v. Dinkins***, 691 F.3d 358, 384 (4th Cir. 2012) (rejecting the argument that the forfeiture-by-wrongdoing exception should not apply to a defendant who was in jail at the time the witness was murdered). The record reflects that after Keys's murder, Holland received a text message from Buchanan on Jones's cell phone. This communication indicates that the men remained in contact even though Jones was incarcerated. Moreover, Keys himself went to Jones's attorney in an attempt to explain why he had given a statement to law enforcement. It is certainly probable and more likely than not that Jones's attorney advised Jones of Keys's statement. Keys's statement implicates Jones in the murder and attempted murders. After Jones learned that Keys had provided the statement, Keys was killed, and two of Jones's codefendants, Holland and Buchanan, were involved in Keys's death.

¶37. As noted in the separate opinion, "[c]onspiracy is a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose unlawfully, the persons agreeing in order to form the conspiracy." CIPR Op. ¶ 75 (internal quotation marks omitted) (quoting Mississippi Code Section 97-1-1 (Rev. 2020)). The separate opinion acknowledges that "the evidence does suggest a combination to accomplish an unlawful purpose" but asserts that "the evidence does not show a measurable degree of planning or sophistication." CIPR Op. ¶ 75. It contends that "the conspiracy to victimize the Loves was far from an ongoing, sophisticated criminal enterprise . . . ." CIPR Op. ¶ 80. But the agreement or plan "need not be formal or express, but *may be inferred from the circumstances*, particularly by declarations, acts, and conduct of the alleged conspirators." ***Hervey v. State***, 764 So. 2d 457, 461 (Miss. Ct. App. 2000) (internal quotation mark omitted) (quoting ***Griffin v. State***, 480 So. 2d 1124, 1126 (Miss. 1985)). Based on the circumstances, particularly the declarations, acts, and conduct of Jones and Holland, sufficient evidence exists to show an agreement to "get," meaning to murder, the Loves.

¶38. The separate opinion further asserts "[t]he facts are insufficient to support a finding by a preponderance of the evidence that the original conspiracy to harm the Loves extended to the slaying of Keys" because the "slaying of Keys . . . occurred a year and a half later." CIPR Op. ¶ 77. But the "slaying of Keys" occurred only five months after the men were indicted for the shooting. In other words, within five months of Jones's being formally charged

with murder and attempted murder, and knowing that Keys's statement facilitated the indictment and implicated Jones in the charges, Keys was killed. Two of the main suspects in Keys's death, Holland and Buchanan, remained in contact with Jones, despite Jones's incarceration, texting Jones shortly after Keys's death.

¶39. We find sufficient evidence was presented to show that Jones was part of an original conspiracy to "get" the Loves. We further find sufficient evidence was presented to show that Keys was killed to prevent his testimony. Indeed, Jones "ha[d] in mind the particular purpose of making the witness unavailable." ***Giles***, 554 U.S. at 367 (the forfeiture-by-wrongdoing exception applies if "the defendant has in mind the particular purpose of makingthe witness unavailable" (quoting Mueller & Kirkpatrick, *supra*, at § 8.134)). Even one of the individuals on the surveillance video stated that Keys "got what he deserved because he turned State's evidence." Keys's murder was an act in furtherance and within the scope of the original conspiracy. ***Cherry***, 217 F.3d at 820. Additionally, as properly noted by the Court of Appeals,

> foreseeable to Jones, particularly in the light of the violent conduct Jones had already engaged in with respect to his actions on the night of the Love shooting. *Cf.* ***Thompson***, 286 F.3d at 966 (finding that co-conspirator informant's murder was not reasonably foreseeable where there was no evidence that defendants, as part of their drug

> conspiracy, had previously engaged in murder or attempted murder). We therefore find no error in the trial court's decision to allow Keys's statement against Jones at trial [under Rule 804(b)(6)].

Buchanan, 2019 WL 6490737, at *12.[5]

¶40. Jones last asserts that "but for the improperly admitted testimony contained in . . . Keys's statement, [he] could not have been found guilty beyond a reasonable doubt." We disagree. Even without Keys's statement, sufficient evidence was

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[5] The separate opinion asserts that the Court of Appeals' decision in this case conflicts with its decision in ***McClung v. State***, 294 So. 3d 1216 (Miss. Ct. App. 2019). CIPR Op. ¶ 81. In ***McClung***, the Court of Appeals found that the forfeiture-by-wrongdoing exception did not apply to McClung and, as a result, Keys's statement should not have been admitted against him. ***McClung***, 294 So. 3d at 1228, 1230. According to the separate opinion, "the evidence on forfeiture by wrongdoing was not distinguishable in any material way from the evidence against Jones." CIPR Op. ¶ 81. We disagree. Unlike Jones, there was no evidence other than Keys's statement that McClung was involved in the murder or attempted murder of the Loves, Jennings, and Stigler. Neither the surviving victims nor Jasmin Cage, Perez Love's girlfriend identified McClung or put him at the scene on the night of the shooting. The only reference to McClung in Keys's statement was that McClung was with them in the Tahoe at the time of the shooting and sat in the back seat on the driver's side. There was no evidence that McClung was armed or that he shot at the Loves, Jennings, or Stigler. Additionally, there was no evidence that McClung was involved in Keys's death or communicated with Jones, Holland, and/or Buchanan after Keys's death.

presented to support Jones's convictions of murder and attempted murder.

¶41. After the shooting, while officers were on the scene, Jasmine Cage approached and advised that she knew the victims. One of the victims, Perez Love, was Cage's boyfriend. Cage explained that on the night of the shooting, she was on her way to Itta Bena to "make sure that [Perez] was not going to the club." She testified that there were not many cars on the highway but that she saw the red Pontiac and she also saw a truck—a Yukon or Tahoe.

¶42. Cage testified that she could not remember the color of the truck nor could she see anyone inside the vehicle. But in an earlier statement given to law enforcement, Cage had identified the color of the vehicle and the individuals in the vehicle. After refreshing her recollection, Cage acknowledged that she had previously told law enforcement that the vehicle was gold and that she saw Keys, Jones, Holland, and David Reedy[6] in the vehicle. She advised that Jones was riding in the front passenger seat and that Holland was in the backseat on the passenger's side. Cage explained that after the gold Yukon or Tahoe passed her, she saw "sparks like fire."

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[6] The record reflects that Reedy was not in the vehicle at the time of the shooting. Cage explained that she thought Reedy was in the Tahoe that night because he formerly owned the vehicle. She was unaware that Keys had taken over the payments.

¶43. In addition to Cage's identification, two of the surviving victims of the shooting—Ken Norris Stigler and Perez Love—testified that Jones and Holland were the ones who fired shots at them and their car.[7] Stigler and Perez Love confirmed that the shooters had traveled in a beige or gold Tahoe-type vehicle. Perez Love stated that Jones used a "baby assault rifle." Both Perez and Stigler stated that Holland used a .40-caliber pistol. Hathcock, the State's firearms and toolmarks identification expert, opined that the 7.62 mm shell casings that were recovered from the highway could have been fired from an AK-47, a semiautomatic assault rifle.[8] And as previously noted, a .40-caliber bullet was recovered from Perez Love's head.

¶44. Stigler testified that he specifically saw Jones shoot Perez Love in the top of the head, and he stated that even after Perez was shot, Jones and Holland continued shooting. Like Cage, Stigler testified that Jones was riding in the front passenger seat and that Holland was in the back seat on the passenger side.

¶45. We do not find that the trial court erred by admitting Keys's statement into evidence under Rule 804(b)(6). But even without the admission of Keys's statement, sufficient

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[7] The other surviving victim, Kelsey Jennings, testified that he did not see the shooters or the car in which they traveled.

[8] Hathcock was unable to determine whether the shell casings were fired from the AK-47 assault rifle used by Jones because Jones's weapon was never recovered.

evidence supports Jones's convictions of murder and attempted murder. Accordingly, his convictions are affirmed.

B. Exclusion of Keys's Statement as Self-Serving

¶46. Jones further argues that Keys's statement should have been excluded as self-serving. For support, Jones relies on ***Simmons v. State***, 805 So. 2d 452, 489 (Miss. 2001). In ***Simmons***, this Court noted that "[o]ur caselaw states that *the defendant* is barred from introducing a statement made by the defendant immediately after the crime, if it is self-serving, and if the State refuses to use any of it." ***Id.*** (emphasis added) (internal quotation marks omitted) (quoting ***Nicholson ex rel. Gollott v. State***, 672 So. 2d 744, 754 (Miss. 1996)). Generally, "declarations of a party in his own favor are not admissible [o]n his behalf." ***Id.*** (internal quotation mark omitted) (quoting ***Shorter v. State***, 257 So. 2d 236,240 (Miss. 1972)). "A self-serving declaration is excluded because there is nothing to guarantee its trustworthiness." ***Id.*** (emphasis omitted) (quoting ***Wilson v. State***, 451 So. 2d 718, 721 (Miss. 1984)).

¶47. Here, as the Court of Appeals properly noted, the State, not the defendant, introduced Keys's statement. ***Buchanan***, 2019 WL 6490737, at *12. Thus, ***Simmons*** is inapplicable.

II. Sedrick Buchanan

¶48. Like Jones, Buchanan argues that the trial court erroneously admitted Keys's videotaped statement under Rule 804(b)(6). But Buchanan also asserts two additional arguments: (1) the trial court erroneously admitted evidence regarding a .40-caliber pistol recovered during his postshooting arrest, and (2) insufficient evidence supports his convictions of aggravated assault. We start with whether sufficient evidence supports Buchanan's convictions.

¶49. "This Court reviews de novo a trial court's ruling on the legal sufficiency of the evidence." ***Haynes v. State***, 250 So. 3d 1241, 1244 (Miss. 2018) (citing ***Brooks v. State***, 203 So. 3d 1134, 1137 (Miss. 2016)). "When reviewing a case for sufficiency of the evidence, '[a]ll credible evidence [that] is consistent with guilt must be accepted as true, and the State is given the benefit of all favorable inferences that may be reasonably drawn from the evidence.'" ***Id.*** (alterations in original) (internal quotation marks omitted) (quoting ***Burrows v. State***, 961 So. 2d 701, 705 (Miss. 2007)). "We examine the evidence in the light most favorable to the State, while keeping in mind the beyond-a-reasonable-doubt burden of proof standard." ***Id.*** (citing ***Dees v. State***, 126 So. 3d 21, 26 (Miss. 2013)). This burden must be satisfied with evidence, not speculation or conjecture. ***Edwards v. State***, 469 So. 2d 68, 69-70 (Miss. 1985); ***Sisk v. State***, 294 So. 2d 472, 475 (Miss. 1974). "Should the facts and inferences . . . 'point in favor of the defendant on any element of the offense with sufficient

force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty,' the proper remedy is for the appellate court to reverse and render." ***Haynes***, 250 So. 3d at 1244 (internal quotation marks omitted) (quoting ***Brown v. State***, 965 So. 2d 1023, 1030 (Miss. 2007)).

¶50. Buchanan was convicted of three counts of aggravated assault. In order to find Buchanan guilty of aggravated assault, there must be evidence beyond a reasonable doubt that Buchanan "attempt[ed] to cause serious bodily injury to another, or cause[d] such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life" or that he "attempt[ed] to cause or purposely or knowingly cause[d] bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm[.]" Miss. Code Ann. § 97-3-7(2)(a)(i)-(ii) (Rev. 2020). ¶51. Under Mississippi law, "a person who acts in 'confederation' with others to violate a law is liable as a principal under either the theory of conspiracy or the theory of aiding and abetting." ***Adams v. State***, 726 So. 2d 1275, 1279 (Miss. Ct. App. 1998) (quoting ***Shedd v. State***, 228 Miss. 381, 87 So. 2d 898, 899 (1956)). "One who aids and abets another in the commission of a crime is guilty as a principal." ***Hughes v. State***, 983 So. 2d 270, 276 (Miss. 2008) (citing ***Rubenstein v. State***, 941 So. 2d 735, 773 n.18 (Miss. 2006)). "To aid and abet the commission of a felony, one must 'do something that will incite, encourage, or assist the actual perpetrator in the commission of the crime . . . [or] participate[] in the design of the felony.'" ***Id.*** (alterations in original) (internal quotation marks

omitted) (quoting ***Vaughn v. State***, 712 So. 2d 721, 724 (Miss. 1998)). We do "not recognize guilt by association." ***Id.*** (citing ***Davis v. State***, 586 So. 2d 817, 821 (Miss. 1991)).

¶52. The Court of Appeals found that Buchanan's presence at Holland's house before the shooting and his presence in the Tahoe at the time of the shooting support his convictions. ***Buchanan***, 2019 WL 6490737, at *19. But none of the eyewitnesses identified Buchanan as a passenger in the Tahoe. Indeed, neither Cage nor Stigler or Perez Love identified Buchanan as a passenger in the vehicle at the time of the shooting. The only evidence against Buchanan was Keys's statement.[9] But as Judge Wilson noted in his separate opinion, "during his approximately forty-three-minute statement, Keys said little about Buchanan and nothing to implicate him as an aider and abettor in the shooting. Keys stated only that Buchanan was sitting in the third-row seat of the Tahoe when the shooting occurred." ***Id.*** at *25 (J. Wilson, P.J., concurring in part and dissenting in part). Such evidence "establishes only [Buchanan's] presence at the scene of the crime." ***Id.*** at *25 (J. Wilson, P.J., concurring in part and dissenting in part).

¶53. According to Keys, a few days before the shooting, Jones stated that he needed to get the Loves because they had shot two of their friends. The

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[9] We do not address Buchanan's challenge to the admission of Keys's statement because even with the statement, the evidence is insufficient to support Buchanan's convictions of aggravated assault.

Court of Appeals relied on this prior conversation as evidence against Buchanan. ***Id.*** at *19. But no evidence was presented that Buchanan was privy to that conversation or knew anything about Jones's intentions.

¶54. The Court of Appeals further found that Buchanan's convictions were supported by (1) his physical proximity to a .40-caliber pistol six months after the shooting and (2) the fact that he "made no attempt to leave the group" after the shooting. ***Id.*** at *19-20. But neither of these facts supports a reasonable inference that Buchanan aided and abetted the shooting.

¶55. First, the evidence shows that the .40-caliber pistol was owned by and registered to Danarius Jackson, and it was found in the center console of Jackson's car six months after the shooting. The State's ballistics expert could only testify that "due to insufficient reproducible characteristics the [.40-caliber] cartridge casing [found at the crime scene] could not be positively included or excluded as having been fired from [Jackson's] gun." As noted by Judge Wilson,

> [t]he only tenuous connection between the gun and anyone or anything in this case is that Buchanan happened to be in Jackson's car when he was arrested on unrelated charges in Carroll County—*six months* after the shooting and *five months* after Buchanan had turned himself in on the charges in this case. Moreover, there is no suggestion

> that Buchanan was one of the shooters in this case, nor is there any evidence that Buchanan ever possessed the pistol that Holland used. In short, there is no evidence that Jackson's gun was used in the shooting or that Buchanan ever had possession of it. All we know is that six months after the shooting Buchanan was sitting in a car with a man who had a .40-caliber handgun. A jury would have to pile speculation upon conjecture to find that Buchanan provided Jackson's gun to Jones to shoot at the Loves.

Id. at *25 (J. Wilson, P.J., concurring in part and dissenting in part) (footnote omitted).

¶56. Second, the fact that Buchanan made no attempt to leave the group after the shooting is insufficient to establish beyond a reasonable doubt that he encouraged or assisted Jones or Holland prior to or during the shooting. "An 'attempt to leave' a murderous group can be a risky proposition. It would be speculation and conjecture to say that Buchanan must have somehow encouraged or assisted in the crime just because he 'made no attempt to leave' afterward." ***Id.*** at *26 (J. Wilson, P.J., concurring in part and dissenting in part). Moreover, Buchanan's failure to leave the group *after* the shooting does not shed light on what he knew *before* the shooting.

¶57. As previously discussed, none of the eyewitnesses to the shooting identified Buchanan as

the shooter. Although Keys stated that Buchanan was in the very back of the Tahoe, his statement only briefly mentions Buchanan and does not reference anything that Buchanan did or said to aid or abet the shooting. Accordingly, we find there is insufficient evidence to support Buchanan's convictions of aggravated assault. We therefore reverse the trial court's judgment of conviction and render a judgment of acquittal on the three counts against Buchanan.[10]

CONCLUSION

¶58. The judgment of the Court of Appeals is affirmed in part and reversed and rendered in part. As to the judgment of the Circuit Court of Leflore County, we affirm Jones's convictions of first-degree murder and attempted first-degree murder; we reverse Buchanan's convictions of aggravated assault and render a judgment of acquittal as to Buchanan.

¶59. **AFFIRMED IN PART; REVERSED AND RENDERED IN PART.**

RANDOLPH, C.J., COLEMAN, MAXWELL, BEAM, CHAMBERLIN AND ISHEE, JJ., CONCUR. KITCHENS, P.J., CONCURS IN PART AND IN RESULT WITH SEPARATE WRITTEN OPINION JOINED BY KING, P.J.; ISHEE, J., JOINS IN PART.

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[10] Because Buchanan's insufficiency-of-the-evidence argument is dispositive, we decline to address the remaining issues asserted in his petition for certiorari.

KITCHENS, PRESIDING JUSTICE, CONCURRING IN PART AND IN RESULT:

¶60. Because the trial court's admission of Jacarius Keys's statement under the hearsay exception for forfeiture by wrongdoing was harmless beyond a reasonable doubt, I agree that this Court should affirm Armand Jones's convictions. Although the right result is to affirm, this case does present an issue of first impression: whether Keys's statement was admissible against Jones under the forfeiture by wrongdoing exception to the hearsay rule and the Confrontation Clause of the Sixth Amendment. Citing federal case law that has been applied to organized crime, the majority adopts a doubtful test which it then applies in an overly broad manner, finding that Jones forfeited his right to confrontation because he was responsible for the death of Keys under a theory of *Pinkerton*[11] liability for coconspirators. But no evidence shows that Jones had any foreknowledge of or involvement in the scheme concocted by others to slay Keys. Moreover, the original conspiracy amongst Jones, Keys, and others to harm D'Alandis and Perez Love did not reasonably encompass Keys's homicide, and it was not reasonably foreseeable. I would hold that the trial court erred by admitting Keys's statement against Jones but that the error was harmless. I respectfully concur in part and in the result with the majority's decision to affirm Jones's conviction. I concur with the majority's decision to reverse and

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[11] *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946).

render a judgment of acquittal as to Sedrick Buchanan.

A. Facts

¶61. As related in the majority opinion, Jones, Keys, Sedrick Buchanan, Michael Holland, and James Earl McClung, Jr., each was indicted for one count of first degree murder and three counts of attempted first degree murder in connection with a drive-by shooting incident in Itta Bena, Mississippi. The incident occurred on August 15, 2015. On that day, D'Alandis Love, Perez Love, Kelsey Jennings, and Ken-Norris Stigler were traveling west on Highway 82 in a red Pontiac car. Suddenly, a gold Chevrolet Tahoe vehicle overtook them, and its occupants began shooting at the red Pontiac. D'Alandis Love was killed, and Perez Love, Jennings, and Stigler sustained gunshot wounds.

¶62. Keys gave a videotaped statement to the police that implicated Jones, Holland, Buchanan, and McClung. In the statement, Keys said that, several days before the shooting, Jones had told the others that he needed to "get one" of the Loves in retaliation for the Loves' having hurt their friends. On the day of the shooting, Keys was driving the group to a bar in Itta Bena when they spotted the red Pontiac with the Loves inside. According to Keys, Jones had an AK-47 assault rifle and, when the Tahoe was abreast of the Pontiac, Jones rolled down the window and began shooting at the Pontiac's occupants. Victims Perez Love and Stigler provided corroboration by testifying that they had witnessed Jones shooting at them with "a baby assault rifle." Stigler said that he

saw Jones shooting at them and that he saw Jones shoot Perez Love in the back of the head. Both testified also that Holland had shot at them with a .40 caliber pistol.[12] Keys said that, after the shooting, the group took measures to conceal the crime, including arranging to swap cars, disposing of Jones's gun, and spending the night in a hotel. The next day, Keys learned that the sheriff was looking for him, so he retained counsel, turned himself in, and gave a videotaped statement to the police. Each of the four defendants—Jones, Holland, Buchanan, and McClung—received a copy of Keys's statement.

¶63. Approximately one and a half years after the drive-by shooting, Keys was killed. Jones was incarcerated at the time. A surveillance video implicated several suspects in Keys's slaying. In particular, it showed Holland carrying a gun and chasing after Keys while Buchanan acted as a lookout. One of the other suspects who was present during Keys's homicide, Anthony Flowers, told the police that Keys "got what he deserved because he turned State's evidence."

¶64. Jones, Holland, Buchanan, and McClung, who were indicted and tried together for the drive-by shooting, filed a pretrial motion to exclude Keys's statement on hearsay and Confrontation Clause grounds. The trial court denied the motion and

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[12] Perez Love testified that he was shot once in the head. Because a .40 caliber bullet was removed from his head wound, it actually was Holland, not Jones, who had shot him. But both Perez Love and Stigler testified that they had seen Jones and Holland shooting at them from the Tahoe.

admitted Keys's statement. On appeal, the Court of Appeals found that Keys's statement was admissible against Jones under exceptions to the hearsay rule and to the right to confrontation that apply to a defendant's forfeiture by wrongdoing. According to the Court of Appeals, the statement was admissible against Jones because "Jones is liable for 'acquiescing' in procuring Keys's unavailability under the conspiratorial responsibility theory announced in ***United States v. Cherry***, 217 F.3d 811 (10th Cir. 2000)." ***Buchanan v. State***, No. 2017-KA-01082-COA, 2019 WL 6490737, at *10 (Miss. Ct. App. Dec. 3, 2019). The majority adopts the reasoning of the Court of Appeals, with which I disagree.

B. The Confrontation Clause

¶65. A trial court's discretionary ruling to admit or exclude evidence is reviewed for abuse of discretion, but constitutional issues are reviewed *de novo*. ***Armstead v. State***, 196 So. 3d 913, 916 (Miss. 2016) (citing ***Williams v. State***, 991 So. 2d 593, 597 (Miss. 2008); ***Smith v. State***, 25 So. 3d 264, 267 (Miss. 2009)). Jones challenges the admission of Keys's statement against him under the confrontation clauses of the United States Constitution and the Mississippi Constitution, which guarantee a criminal defendant the right to confront the witnesses against him. U.S.Const. amend. VI; U.S. Const. amend XIV; Miss. Const. art. 3, § 26. In ***Crawford v. Washington***, the United States Supreme Court held that "the testimonial statements of a witness who does not testify at trial are inadmissible unless the witness is unavailable and the defendant had a prior

opportunity for cross-examination." *Conners v. State*, 92 So. 3d 676, 683 (Miss. 2012) (citing *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 1364, 158 L. Ed. 2d 177 (2004)). *Crawford* overruled *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), "insofar as it stood for the proposition that the admissibility of hearsay evidence depends upon whether 'it falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness."'" *Birkhead v. State*, 57 So. 3d 1223, 1234 n.11 (Miss. 2011) (citing *Crawford*, 541 U.S. at 60, 67-68 (quoting *Roberts*, 448 U.S. at 66)).

¶66. Keys's statement to the police was testimonial hearsay and subject to exclusion under the state and federal confrontation clauses. The majority finds that the statement was admissible against Jones under the forfeiture by wrongdoing exception to the right to confrontation. Under that exception, "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." *Davis v. Washington*, 547 U.S. 813, 833, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). This is because "when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce." *Id.* Mississippi Rule of Evidence 804(b)(6) provides an exception to hearsay for forfeiture by wrongdoing that permits the admission of "[a] statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result." MRE 804(b)(6). When the Confrontation Clause applies, Rule 804(b)(6) is applied coextensively with the

exception to the confrontation right for waiver by misconduct. ***Cherry***, 217 F.3d at 816. A party seeking admission of hearsay under the forfeiture by wrongdoing exception must make the requisite showing by a preponderance of the evidence. ***United States v. Gurrola***, 898 F.3d 524, 534 (5th Cir. 2018).

*C. The **Cherry** Test*

¶67. Jones argues that the State failed to show by a preponderance of the evidence that he procured Keys's absence because nothing shows that Jones had anything to do with the plot by Holland, Buchanan, and others to kill Keys. Like the Court of Appeals, the majority relies on ***Cherry*** and finds that Jones's argument is without merit. ***Cherry*** applied the ***Pinkerton*** rule of conspiratorial liability to determine whether a defendant had waived confrontation and hearsay objections. ***Cherry***, 217 F.3d at 820. In ***Cherry***, five codefendants objected to the admission of a statement from one of the government's witnesses, Ebon Sekou Lurks, who was killed before the trial. ***Id.*** at 813. The district court had admitted the statement against one of the defendants who had participated in Lurks's killing but excluded it from the trial of three defendants who had lacked knowledge of Lurks's homicide and who had not agreed to or participated in it. ***Id.*** at 814.

¶68. On appeal, the United States Court of Appeals for the Tenth Circuit reversed. ***Id.*** at 821. The court reviewed "whether Rule 804(b)(6) and the Confrontation Clause permit a finding of waiver based not on direct procurement but rather on

involvement in a conspiracy, one of the members of which wrongfully procured a witness's unavailability." *Id.* at 815. The court found that the words "engaged or acquiesced in wrongdoing" in Rule 804(b)(6) supported the argument "that, at least for purposes of the hearsay rules, waiver can be imputed under an agency theory of responsibility to a defendant who 'acquiesced' in the wrongful procurement of a witness's unavailability but did not actually 'engage[]' in wrongdoing apart from the conspiracy itself." *Id.* (alteration in original) (internal quotation marks omitted) (quoting Fed. R. Evid. 804(b)(6)). The court found that *Pinkerton* conspiratorial liability, under which "[t]he overt act of one partner in crime is attributable to all," *id.* at 816 (quoting *Pinkerton*, 328 U.S. at 647), applied to determinations of forfeiture by wrongdoing and crafted a rule that

> [a] defendant may be deemed to have waived his or her Confrontation Clause rights (and, a fortiori, hearsay objections) if a preponderance of the evidence establishes one of the following circumstances: (1) he or she participated directly in planning or procuring the declarant's unavailability through wrongdoing; or (2) the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy.

Id. at 820 (citations omitted). The court remanded for the district court to apply the new test. *Id.* at 821.

¶69. I note that *Cherry* did not craft a completely open-ended conspiratorial liability test for admissibility under the forfeiture by wrongdoing exception. *Cherry* recognized that due process places limits on *Pinkerton* liability. "[M]ere participation in a conspiracy does not suffice[.]" *Id.* at 820. And *Cherry* acknowledged that a conspirator's liability for the acts of coconspirators ends when the "conspiracy accomplished its goals or that conspirator withdraws." *Id.* at 817 (internal quotation mark omitted) (quoting *United States v. Brewer*, 983 F.2d 181, 185 (10th Cir. 1993)). Under *Cherry*, if one coconspirator procured the unavailability of a witness, the witness's prior unconfronted statement is admissible against coconspirators who had no knowledge of or involvement in procuring the witness's absence if, and only if, the wrongful procurement was in furtherance of the conspiracy, within its scope, and reasonably foreseeable as a necessary and natural consequence of an ongoing conspiracy. *Id.* at 820.

¶70. The problem with this Court's adoption of *Cherry* is that the decision stands on shaky ground. First and foremost, *Cherry* was decided in 2000, before the Supreme Court's 2004 decision in *Crawford* that changed the landscape of Confrontation Clause jurisprudence. Additionally, in another post-*Cherry* decision, the United States Supreme Court narrowed the confrontation right's forfeiture by wrongdoing exception. *Giles v. California*, 554 U.S. 353, 359, 128 S. Ct. 2678, 2683, 171 L. Ed. 2d 488 (2008). *Giles* reaffirmed *Crawford*'s holding that exceptions to the confrontation right are

limited to those in effect at the time of the founding. ***Id.*** at 358. After determining which exceptions were established law at the founding, ***Giles*** held that forfeiture by wrongdoing applies only when the defendant "engaged in conduct *designed* to prevent the witness from testifying." ***Id.*** at 359. ¶71. Because ***Cherry*** was decided before ***Crawford*** and ***Giles***, its continuing viability is in question. The majority not only relies on ***Cherry***, but it relies also on another pre-***Crawford*** and ***Giles*** decision that applied ***Cherry***, ***United States v. Thompson***, 286 F.3d 950 (7th Cir. 2002). In ***Thompson***, the United States Court of Appeals for the Seventh Circuit adopted the ***Cherry*** test and used it to determine whether hearsay statements were admissible against coconspirators under the forfeiture by wrongdoing exception. ***Id.*** at 963-66. But in a 2020 decision, the Seventh Circuit reexamined ***Thompson*** in light of ***Crawford*** and ***Giles***. ***United States v. Brown***, 973 F.3d 667, 699-701 (7th Cir. 2020). The circuit court recognized that ***Pinkerton*** liability, under which "a person is liable for an offense committed by a coconspirator when its commission is reasonably foreseeable to that person and is in furtherance of the conspiracy[,]" is a relatively new concept. ***Id.*** (citing ***Pinkerton***, 328 U.S. at 647). The circuit court found that ***Pinkerton*** liability was not a recognized legal concept at common law or at the time of the founding. "In the 18th century, criminal liability was generally limited to those who acted as principals or those who aided and abetted." ***Id.*** at 701.

The Seventh Circuit said that "[u]nder a strict reading of ***Crawford*** and ***Giles***, it seems that ***Thompson*** may no longer be good law." ***Id.*** But the

circuit court declined to answer that question because it found that the admission of the hearsay statements against the defendant had been harmless beyond a reasonable doubt. ***Id.***

¶72. As discussed in ***Brown***, the decisions of the United States Supreme Court in ***Crawford*** and ***Giles*** have cast ***Cherry*** into doubt. For that reason, this Court should not adopt ***Cherry***.

D. The evidence adduced by the State fails the ***Cherry*** *test.*

¶73. Even applying the ***Cherry*** test, Keys's statement should not have been admitted against Jones. It is undisputed that Jones did not "participate[] directly in planning or procuring [Keys's] unavailability through wrongdoing . . . ." ***Cherry***, 217 F.3d at 820. To be clear, no one advocates and no evidence exists that Jones was aware of or participated in any way in an agreement between Holland, Buchanan, and others to murder Keys. Jones was not a suspect in Keys's homicide. He was in jail at the time of Keys's death. Because Keys had told Jones's defense attorney that he had talked to the police, Jones, like Holland, Buchanan, and McClung, likely knew that Keys had given a statement to the investigating authorities. After Keys's murder, when Buchanan was incarcerated at the same facility as Jones, Holland received a text message from Buchanan that had come from Jones's cell phone. The text said, "hey, this is Sed." Nothing indicated that the text related to Keys's murder.

¶74. Because Jones did not directly participate in killing Keys, the question is whether "the wrongful procurement [of Keys's absence by others] was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy." ***Cherry***, 217 F.3d at 820 (citation omitted). The majority finds that the actions of Holland and Buchanan can be imputed to Jones because Keys's homicide was in furtherance of the original conspiracy amongst Jones, Holland, Buchanan, Keys, and McClung to "get" the Loves, was within the scope of that conspiracy, and was reasonably foreseeable to Jones.

¶75. The majority's logic fails on several levels. The agreement to harm the Loves was not an "ongoing conspiracy" as required by ***Cherry***. "Conspiracy is a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose unlawfully, the persons agreeing in order to form the conspiracy." Miss. Code Ann. § 97-1-1 (Rev. 2020). None of the defendants charged with involvement in the drive-by shooting was indicted for conspiracy. The evidence supporting the existence of a conspiracy consisted of Jones's having told the others that he wanted to "get" the Loves, and then when the group saw the Loves' vehicle, they decided to pass the Loves' car, roll down the car windows, and open fire. Testimony established that Jones routinely carried the weapon he used in the shooting, which evinces spontaneity. Although the evidence does suggest a combination to accomplish an unlawful purpose, the evidence does not show a measurable degree of planning or sophistication. Nor does the evidence show that the conspiracy had any goal

beyond "getting" the Loves. Once that limited goal was accomplished, the conspiracy was at an end. ***Cherry***, 217 F.3d at 817.

¶76. The majority finds that the conspiracy to "get" the Loves included the slaying of Keys because a conspiracy "can also include secondary goals relevant to the evasion of apprehension and prosecution for that goal—such as escape, or, by analogy, obstruction of justice." Maj. Op. at ¶ 24 (internal quotation mark omitted) (quoting ***Cherry***, 217 F.3d at 821). But the United States Supreme Court has held that

> after the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment.

Grunewald v. United States, 353 U.S. 391, 401, 77 S. Ct. 963, 1 L. Ed. 2d 931 (1957). Under ***Grunewald***, "efforts to conceal a conspiracy are not automatically a part of the conspiracy." ***United States v. Masters***, 924 F.2d 1362 (7th Cir. 1991). Therefore, although a conspiracy *can* include secondary goals of concealment, a conspiracy does not *automatically* include concealment as one of its goals. Rather, the facts must establish sufficiently that the conspiracy included a secondary agreement to cover up the crime.

¶77. The facts are insufficient to support a finding by a preponderance of the evidence that the original conspiracy to harm the Loves extended to the slaying of Keys. Certainly, Jones, Holland, McClung, Keys, and Buchanan took steps on the night of the drive-by shooting to conceal the crime, including swapping the Tahoe for another car, getting rid of weapons, and staying in a hotel. But all of those efforts occurred in the immediate aftermath of the shooting. The slaying of Keys by Holland, Buchanan, and others occurred a year and a half later. Keys's murder was too attenuated in time and too distinct from the original conspiracy's goal of "getting" the Loves to have been within the scope of the original conspiracy. That conspiracy had ended and was not still ongoing a year and a half later.

¶78. The majority asserts that the timing of the original coconspirators' indictments, five months before Keys's killing, is somehow relevant. But the indictments for the drive-by shooting were handed down more than a year after the original conspiracy had ended, and nothing shows that the original coconspirators' indictments in some way revived or extended their original conspiracy to "get" the Loves. While the indictments may have been a factor in prompting Holland and Buchanan's entry into a new conspiracy to kill Keys, nothing shows that this new conspiracy included Jones. Again, the only way that liability for Keys's death could be imputed to Jones is if a preponderance of the evidence shows that the original conspiracy to harm the Loves, of which Jones was a member, also included as a reasonably foreseeable goal the slaying of Keys. But no evidence shows that it did.

¶79. The majority approves of the Court of Appeals' reliance on *Thompson* and finds that, because Jones had engaged in violent conduct with respect to the Loves, he reasonably should have foreseen that the members of the conspiracy to harm the Loves would engage in other murderous conduct. *Thompson* held that a witness's murder had not been reasonably foreseeable to coconspirators who had not participated in the murder because there was no evidence that the defendants' drug conspiracy previously had perpetrated murder or attempted murder. *Thompson*, 286 F.3d at 960. The majority finds that, unlike in *Thompson*, Jones reasonably should have anticipated that his coconspirators would murder a witness because the original conspiracy had involved a murder. But that analysis neglects the key fact that the original conspiracy to harm the Loves had been completed. It had but one goal, to harm the Loves, and it ended when that goal was accomplished. Moreover, Keys was a member of the original conspiracy. He certainly did not agree to his own death, and there was no evidence that the original conspirators had planned to do away with its members should they turn State's evidence. *Cf. United States v. Adoma*, 781 F. App'x 199, 204 (4th Cir. 2019) (conspirator reasonably should have anticipated witness's murder by the other members of a RICO conspiracy because killing was required for gang membership, he already had committed murder on behalf of the gang, and he likely knew other gang members had worked to silence the witness on his behalf). Considering that the original conspiracy was not ongoing and had a single purpose, to "get" the Loves, the killing of one of the

original coconspirators for turning State's evidence a year and a half later was not "reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy." *Cherry*, 217 F.3d at 820. Although Jones knew that Keys had given a statement to the police, no evidence was adduced that he reasonably should have foreseen that Holland and Buchanan would take the drastic step of killing him. The evidence was insufficient to establish by a preponderance that by wrongdoing, Jones had forfeited his right to confrontation of the witnesses against him.

¶80. What is more, the conspiracy to victimize the Loves was far from an ongoing, sophisticated criminal enterprise such as a drug-dealing ring, a gang with a reputation for silencing witnesses violently, or a racketeering operation. In fact, no level of organization was shown. Therefore, this case stands in stark contrast to *Cherry*, *Thompson*, and other cases that considered the imputation of liability to a coconspirator for procuring a witness's absence. *Cherry*, 217 F.3d at 813 (drug conspiracy); *Thompson*, 286 F.3d at 956 ("large, Indianapolis-based drug conspiracy" that "reigned from 1992 to 1997," involving trafficking hundreds of kilos of cocaine, money laundering, and two business pursuits); *United States v. Dinkins*, 691 F.3d 358, 363 (4th Cir. 2012) (large-scale drug dealing operation that "committed numerous acts of violence in furtherance of their narcotics activities"); *United States v. Carson*, 455 F.3d 336, 339 (D.C. Cir. 2006) (racketeering conspiracy involving violent, "organized and massive business of selling drugs"). Because there was no ongoing conspiracy, this case is not analogous to *Thompson* and the other cases that

applied ***Cherry***. The majority applies case law designed for sophisticated criminal enterprises with overarching criminal aims to a single-goal conspiracy so underdeveloped that the State did not see fit to charge any of its participants with conspiracy.

E. The Court of Appeals' decision conflicts with ***McClung v. State****, 294 So. 3d 1216 (Miss. Ct. App. 2019).*

¶81. Another problem is that the Court of Appeals' decision, which the majority affirms, conflicts with its decision in ***McClung***. In McClung's case, the Court of Appeals applied the ***Cherry*** test and found that the forfeiture by wrongdoing exception did not apply to McClung and, therefore, Keys's statement should not have been admitted against him. ***McClung***, 294 So. 3d at 1230. But the evidence on forfeiture by wrongdoing was not distinguishable in any material way from the evidence against Jones. ***McClung*** held that:

> [W]e find that the State did not present sufficient evidence that McClung conspired with any other defendant to kill Keys or that Keys's death was foreseeable to McClung. To the extent that McClung was a part of the shooting incident, the State made no showing that any conspiracy to do so, and involving McClung, continued as far as McClung's involvement or acquiescence in killing Keys. *See* ***Thompson***, 286 F.3d at 965 ("By limiting coconspirator waiver-by-misconduct to those acts that

> were reasonably foreseeable to each individual defendant, the [conspiratorial responsibility] rule captures only those conspirators that actually acquiesced either explicitly or implicitly to the misconduct."). Sergeant Bankston testified that McClung was not present the night Keys was killed, nor was McClung developed as a suspect in the Keys murder. Indeed, Keys's murder occurred one and a half years after the shooting and from the time when Keys gave his statement. There also is no evidence in the record of any communication between McClung and Holland or McClung and Buchanan (both suspects in Keys's killing)—either before or after Keys was shot.
>
> Based upon our de novo review of the record and the applicable law, we conclude that the trial court erred in admitting Keys's statement against McClung based upon the forfeiture-by-wrongdoing doctrine.

Id. (alteration in original).

¶82. Like McClung, Jones was part of the original conspiracy against the Loves. As in *McClung*, Jones's attorney had been informed that Keys had given a statement that inculpated him in the drive-by shooting. As in *McClung*, no evidence was adduced that Jones had helped plan or execute the slaying of

Keys. The only difference in the forfeiture by wrongdoing evidence against McClung versus that against Jones was the additional fact that, after Keys was killed, Buchanan texted Holland from jail using Jones's cell phone. But that additional fact was immaterial. Jones and Buchanan were members of the original conspiracy, so of course they knew each other. The text Buchanan sent to Holland on Jones's cell phone did not concern the slaying of Keys. The fact that Buchanan sent a text message from jail to Buchanan using Jones's cell phone saying, "hey, this is Sed" does not increase the likelihood that Keys's slaying should have been reasonably foreseeable to Jones as part of the original conspiracy. To contend otherwise has no basis in logic. Rather, as the Court of Appeals held regarding McClung, "[t]o the extent that [Jones] was a part of the shooting incident, the State made no showing that any conspiracy to do so, and involving [Jones], continued as far as [Jones]'s involvement or acquiescence in killing Keys." ***Id.*** One of this Court's roles in *certiorari* cases is to resolve conflicts in the decisions of the Court of
Appeals; but the majority's decision ratifies, rather than resolves, the conflict between ***Jones*** and ***McClung***.[13]

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[13] The majority attempts to distinguish ***McClung*** because the evidence that McClung was part of the original conspiracy to "get" the Loves was weak. But the Court of Appeals did not distinguish the cases on that ground. Instead, the Court of Appeals found that McClung (like Jones) had been a member of the original conspiracy against the Loves. ***McClung***, 294 So. 3d at 1230. But unlike in this case, the Court of Appeals found that liability for Keys's death could not be imputed to McClung because the State had not shown that Keys's slaying was reasonably foreseeable to him. ***Id.*** I find its reasons for doing so indistinguishable from this case.

F. Harmless Error

¶83. Because any error in admitting Keys's statement against Jones was harmless, this Court has no reason at this time to explore the contours of the forfeiture by wrongdoing exception to the state and federal confrontation rights. Violations of the confrontation clause "are subject to harmless-error analysis." ***Conners***, 92 So. 3d at 684 (citing ***Corbin v. State***, 74 So. 3d 333, 338 (Miss. 2011)). This Court will affirm when, after reviewing the entire record, we can confidently find that "the constitutional error was harmless beyond a reasonable doubt." ***Id.*** (internal quotation mark omitted) (citing ***Delaware v. Van Arsdall***, 475 U.S. 673, 681, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)). "Harmless errors are those 'which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.'" ***Id.*** (quoting ***Chapman v. California***, 386 U.S. 18, 22, 87 S. Ct. 824, 827, 17 L. Ed. 2d 705 (1967)).

¶84. As the majority sets forth, two surviving victims of the drive-by shooting, Perez Love and Stigler, testified that they watched Jones repeatedly fire his AK-47 upon them. Additionally, Perez Love's girlfriend, Jasmine Cage, testified that she had been following the red Pontiac in an effort to prevent her boyfriend from going to the club when she saw a Tahoe pass her car. Just after it passed her, she saw "sparks like fire." In a statement to law enforcement officers, Cage said that she had seen Jones, Keys,

and Holland in the vehicle and that Jones and Holland were on the passenger's side. Shell casings consistent with the AK-47 fired by Jones were found at the scene. Shell casings from Holland's .40 caliber pistol were recovered from the scene, and a bullet fired from Holland's pistol was recovered from Perez Love's head. In light of the overwhelming evidence against Jones, the admission of Keys's statement, which was largely cumulative of the testimony of Perez Love and Stigler, was harmless beyond a reasonable doubt.[14]

G. Conclusion

¶85. The majority plucks the ***Cherry*** test from the vast expanse of federal criminal law and decides it is appropriate for determining forfeiture by wrongdoing questions in our state. But because ***Cherry*** was decided before the United States Supreme Court's landmark decisions in ***Crawford*** and ***Giles***, its viability is doubtful. Furthermore, the majority applies ***Cherry*** in an extremely broad manner, ignoring the fact that this Court may afford additional protections to defendants under the Mississippi Constitution than are bestowed by the federal constitution. Even applying ***Cherry***, Keys's statement was inadmissible because Keys's homicide

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[14] The majority finds that the evidence was sufficient to support Jones's convictions even without Keys's statement. But the constitutional standard for the erroneous admission of evidence in violation of the Confrontation Clause is not whether the evidence was sufficient to sustain the convictions even without the erroneously admitted evidence, but whether the error in admitting the evidence was harmless beyond a reasonable doubt. ***Conners***, 92 So. 3d at 684.

was not within the scope of the original conspiracy, in furtherance of the original conspiracy, or reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy. Because the admission of Keys's statement against Jones was harmless error, I would avoid the *Cherry* morass and affirm the decision of the Court of Appeals as to Jones on other grounds. I agree with the majority's decision to reverse and render a judgment of acquittal as to Buchanan.

KING, P.J., JOINS THIS OPINION. ISHEE, J., JOINS THIS OPINION IN PART.

IN THE CIRCUIT COURT OF LEFLORE COUNTY, MISSISSIPPI

NO. 2016-0063CICR

STATE OF MISSISSIPPI

v.

ARMAND JONES A/K/A A.J JONES,
MICHAEL HOLLAND, SEDRICK BUCHANAN,
AND JAMES EARL MCCLUNG, JR.

TRANSCRIPT OF THE PROCEEDINGS HAD AND DONE IN THE TRIAL OF THE ABOVE STYLED AND NUMBERED CAUSE, BEFORE THE HONORABLE ASHLEY HINES, CIRCUIT JUDGE, AND A JURY OF TWELVE MEN AND WOMEN, DULY IMPANELED, ON THE 15TH OF MAY 2017

Bench Ruling on Pre-Trial Hearing Regarding Admission of Statement of Jacarius Keys

BY THE COURT: All right. The Court has carefully reviewed the law presented by the parties in the case, and I have reviewed the testimony and the arguments of counsel , and the opinion of the Court, the State has met its burden under the rules to admit the statement. So the statement is to be admitted to the jury. I will enter a written opinion subsequent to today in the record stating all my reasons.

(Transcript at 220-221).

IN THE CIRCUIT COURT OF LEFLORE COUNTY, MISSISSIPPI

CAUSE NO. 2016-0063

STATE OF MISSISSIPPI, PLAINTIFF

v.

ARMAND JONES A/K/A A.J. JONES
MICHAEL HOLLAND,
SEDRICK BUCHANAN, AND
JAMES EARL MCCLUNG, JR.

ORDER

THIS CAUSE came before the Court on James McClung's Motion to Exclude the Statements and/or Videotaped Statements of Jacarius Keys. The remaining defendants have joined in said motion. After due consideration of said motion and oral arguments, this Court has made the following determinations.

In July 2016, Armand Jones, Jacarius Keys, Michael Holland, Sedrick Buchanan, and James McClung were indicted for the Murder of Delandis Love and the Attempted Murder of Perez Love, Kelsey Jennings, and Kenorris Stigler. The alleged crime occurred on or about August 15, 2015.

Mr. Keys gave a videotaped statement in this case in which he claims that on or about August 15, 2015, he was driving his vehicle in a westerly direction on HWY 82 near Itta Bena, MS. He states that the remaining defendants were present in his

vehicle. He further claims that while they were traveling on HWY 82, Armand Jones fired an AK-47 at a vehicle that Mr. Jones believed contained "the Loves." Since giving his statement, Mr. Keys has been killed. It is alleged that one or more of the defendants is responsible for his death. The remaining defendants are now before this Court seeking to have Mr. Keys' statement excluded as hearsay.

The State argues that the statement should be allowed under Ru1e 804(b)(3)(A), 804(b)(5), or 804(b)(6) ofthe Mississippi *Rules* of Evidence. *Rule* 804(b) contains exceptions to the hearsay ru1e when the witness in unavailable. Pursuant to 804(a)(4) a deceased witness is considered unavailable. Mr. Keys has died and is therefore unavailable under 804(a)(4). Therefore, before the Court can allow his statement to be admitted, the Court must determine if one of the exceptions found in 804(b) has been met.

804(b)(3)(A)

Pursuant to 804(b)(3)(A) a statement against self-interest is an exception to the hearsay rule. According to 804(b)(3)(A) a statement against self-interest is a statement that a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability.

According to the comments to Rule 804, declarations against penal interest are admissible on the theory that they are reliable, because "[n]o reasonable person would make such a statement and invite possible criminal prosecution if the statement were not true." To qualify under 804(b)(3), the statement needs to be "sufficiently against the declarant's penal interest 'that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.' *"Hartfield v. State,* 161 So.3d 125, 136 (,15) (Miss. 2015) (quoting *Williamson v. United States,* 512 U.S. 594,603-04, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994)). The proponent is "required to show that the statement clearly and directly implicates the declarant himself in criminal conduct." *Id.* (quoting *US v. Sarmiento-Perez,* 633 F.2d 1092, 1101 (5th Cir. 1981)). A statement that serves, rather than prejudices, a defendant's interests does not qualify. *Id* (citing *Ponthieux v. State,* 532 So.2d 1239, 1246 (Miss.l988)). The determination of whether a statement is against the declarant's penal interest must be made by considering the statement in light of the surrounding circumstances. *Id* (citing *Williamson,* 512 U.S. at 604, 114 S.Ct. 2431).

At the time Mr. Keys made his statement, he had already been indicted and was awaiting trial in this case. Mr. Keys was read his Miranda Rights prior to his statement and had an attorney present during the time he gave his statement. In his statement, Mr. Keys places himself as the vehicle used to commit the crime. He states that he knew, Mr. Jones, the shooter, had an AK-47. He also talks about fleeing the scene of the crime. The Court finds that Mr. Keys' statement clearly implicated him in a

crime, that his interests were prejudiced by making the statement, and considering the surrounding circumstances, the statement was against his penal interest. Accordingly the statement meets the exception found in 804(b)(3)(A) and can be admitted into evidence.

804(b)(5)

To qualify under 804(b)(5), a statement must have the equivalent circumstantial guarantees of trustworthiness as the other exception, it must be offered as evidence of a material fact, it must be more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts, it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts, admitting it must best serve the purposes of these rules and the interests of justice, and the adverse party must be given reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

In looking at the five requirements for admission under 804(b)(5) the Court must first find that the statement is sufficiently reliable. *Parker v. State,* 606 So.2d 1132, 1138 (Miss. 1992) (citing *Cummins v. State,* 515 So.2d 869, 874 (Miss. 1987)). Next, the need for the evidence must be weighed against its trustworthiness, considering such factors as whether the statement is oral or written, the character of the statement, the relationship of the parties, the motivation of the declarant, and the

circumstances under which the statement was *made. Id.* Third, the hearsay evidence must meet the requirements of M.R.E. 401 and 402 concerning materiality and if the declarant is alive, the court must also found that reasonable efforts were made to obtain his live testimony. *Id.* Finally, notice must be given by the proponent of the evidence sufficiently in advance of trial to provide the opponent with a fair opportunity to meet it. *Id.*

The Court finds that in the present case, Mr. Keys' statement is evidence of a material fact, that it is more probative than any other evidence that could have been offered by the proponent, and that the purposes of the Rules of Evidence will be served by admission of the hearsay statements, statement has a circumstantial guarantee of trustworthiness, and that sufficient notice has been given to the defendants. Accordingly, the Court finds that Mr. Keys' statement can be presented pursuant to Rule 804(b)(5).

804(b)(6)

The final exception that the State claims makes the statement admissible is Rule 804(b)(6). Pursuant to 804(b)(6), statements offered against a party that wrongfully caused or acquiesced in wrongfully causing the declarant's unavailability as a witness, and did so intending that result are not excluded by the hearsay rules. In the present case it is alleged that the defendant Michael Holland killed Mr. Keys. A video was presented during the hearing showing Mr. Holland, with a gun in his hand, chasing Mr. Keys moments before Mr. Keys was shot

and killed. The video also showed Sedrick Buchanan near the scene of Mr. Keys' murder.

This Court could not find and the parties have not submitted any Mississippi case interpreting or applying 804(b)(6). Therefore, the Court has looked to the comments for Rule 804 and to the federal courts for guidance regarding this issue. The comments for Rule 804 state in pertinent part as follows:

> Rule 804(b)(6) provides that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself." *United State v. Mastrangelo,* 693 F.2d 269, 273 (2d Cir. 1982), cert, denied, 104 S. Ct. 2385(1984). *Davis v. Washington,* 126 S. Ct. 2266, 2280 (2006) ("While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system."). Likewise, a party forfeits rights under the Confrontation Clause when misconduct attributable to a party causes a witness's absence. *US v. Carson,* 455

> F.3d 336 (C.A.D.C. 2006) (wrongdoing by coconspirators). The wrongdoing need not consist of a criminal act and the rule applies to all parties, including the government.

Under federal law, in order for the forfeiture-by-wrongdoing exception to apply, the court must find that (1) the defendant engaged or acquiesced in wrongdoing (2) that was intended to render the declarant unavailable as a witness and (3) that did, in fact, render the declarant unavailable as a witness. *United States v. Gray,* 405 F.3d 227, 241 (5th Cir. 2005) (citing *United States v. Scott,* 284 F.3d 758, 762 (7th Cir.2002). According to the Seventh Circuit, the waiver-by-misconduct of the right to confront witnesses by one conspirator, resulting from misconduct by that conspirator which causes the witness' unavailability, may be imputed to another conspirator if the misconduct was within the scope and in furtherance of the conspiracy, and was reasonably foreseeable to him. *United States v. Thompson,* 286 F.3d 950, 965 (7th Cir. 2002).

The Court finds by a preponderance of the evidence presented during the hearing on this matter that Michael Holland killed Jacarius Keys, that there is sufficient evidence to infer that this killing was done to prevent Mr. Keys from testifying, and is admissible pursuant to 804(b)(6). The Court further finds that although the defendants have not been charged with the crime of conspiracy in this case they are charged with acting in concert with each other. Therefore, the Court finds that the holding in *Thompson* allowing waiver-by-misconduct exception

found 804(b)(6) can be imputed to the defendants in this case and finds that the murder of Mr. Keys was a potential benefit to all of the defendants in this case and reasonably foreseeable by them. Accordingly, the Court finds Mr. Keys' statement is admissible pursuant to 804(b)(6).

Having found Mr. Keys' statement to be admissible pursuant to 804(b)(3)(A), 804(b)(5), and 804(b)(6), the Court finds the motions shall be denied.

IT IS, **THEREFORE, ORDERED** that James McClung's Motion to Exclude the Statements and/or Videotaped Statements of Jacarius Keys shall be and is hereby DENIED.

SO ORDERED AND ADJUDGED this the 16th day of May, 2016.

s/ Ashley Hines
CIRCUIT JUDGE

[*The original is stamped with the following:*]

FILED
May 30 2017
Elmus Stockstill, Circuit Clerk
BY: s/ Kelly Roberts D.C.

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
Office of the Clerk

May 27, 2021

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 27th day of May, 2021.

Supreme Court Case # 2017-CT-01082-SCT

Trial Court Case # 2016-0063 (CICR)

Sedrick Buchanan and Armand Jones a/k/a Armond Jones a/k/a A.J. Jones v. State of Mississippi

The Motion for Rehearing filed by Armand Jones is denied.

*NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS *

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

Please note: Pursuant to MRAP 45(c), amended effective July, 1, 2010, copies of opinions will not be mailed. Any opinion rendered may be found by visiting the Court's website at: https://courts.ms.gov, and selecting the appropriate date the opinion was rendered under the category "Decisions."