those conversations, the petitioner tells Ms. England such things as he had no use for her, that she could "be whatever you want to be as long as it's loyal and honest and true to me, that he would never leave her unless she was disloyal, that she should not be running her mouth – "[i]t's destructive[,]" that he loved her but she was lying, that he wanted her loyalty, and that he wanted a woman he could count on and trust.[4] Critically, these recorded conversations fail to show the petitioner either threatening to harm Ms. England, coercing her, or intimidating her in any way. Moreover, the record was devoid of any evidence of domestic violence or an abusive relationship between the petitioner and Ms. England which could have factored into the determination of any perceived "wrongdoing" by the petitioner regarding Ms. England's decision to decline a plea deal offered by the State.[5] Nonetheless,

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[4] Closing its eyes to the reality of criminal law at the trial court level, the majority determines that these statements not only support the circuit court's finding that the petitioner "acted with intent to render Ms. England unavailable to testify at trial[,]" but that "he exerted enough power over her to persuade her to abandon a plea deal that earned her a sentencing recommendation from the State, no recommendation for a gun-specific finding, and dismissal of the second count in the indictment."

Quite frankly, it is no wonder that Ms. England backed out of this so-called plea "deal." In the eyes of many defense attorneys, a plea deal that results in a recommended sentence of forty years is no deal at all, although it could be a starting point for plea negotiations – an option within the control of the State, which, for reasons unknown, seems never to have considered the possibility of "sweetening the deal" in exchange for Ms. England's testimony.

[5] Ms. England did not blame the petitioner for her decision. Importantly, the circuit court found her decision not to go forward with the plea deal to be made "knowingly, intelligently, *and without threat of coercion, force, or duress*." The prosecutor spoke with Ms. England, with her counsel present, and when the prosecutor asked Ms. England the leading question of whether she was afraid of the petitioner, she responded, "Oh, definitely." Ms. England never offered details concerning her alleged "fear" of the petitioner, and she never stated that her alleged "fear" was what caused her to change her mind regarding the plea agreement. *See supra* note 4.

despite the narrow application of the forfeiture-by-wrongdoing doctrine espoused (albeit in dicta) in *Mechling*, the majority here expands the doctrine to usurp the petitioner's right to confront his co-defendant based upon comments made by the petitioner to the co-defendant, which lack any indicia of actual or threatened coercion, intimidation, physical harm, or the like, and which did not involve any hint of domestic violence. This is a gigantic leap far beyond anything intended in *Mechling*, and serves to remind us of Justice Scalia's warning that "the guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider 'fair.'" *Giles*, 554 U.S. at 375.

There are very few cases from other jurisdictions in which courts have held the type of conduct displayed by the petitioner herein sufficient to find forfeiture of the right to confront a witness. The closest is the recent decision issued by the Court of Appeal of California in *People v. Reneaux*, 264 Cal.Rptr.3d 459 (Cal. Ct. App. 2020), *reh'g denied* (July 14, 2020), *review denied* (Aug. 26, 2020), which at its core involved domestic violence. In *Reneaux*, the defendant was convicted of inflicting corporal injury on his girlfriend, false imprisonment of her and dissuading her from testifying against him. The California court found that the defendant had forfeited his right to confront his girlfriend by his own wrongdoing, which consisted of the following:

> About a week before he was arrested, defendant went to E.'s apartment and spoke with her to "make peace." On the day he was arrested, he called E. from jail. He told her she needed to call law enforcement and tell them she had made a false report. She agreed to make the call. He continued, that she

> needed to tell law enforcement it was all a lie. She agreed to tell them that. He told her it was "the only way," the only thing she could do, because he wanted to marry her, and if he went to prison he would not have her anymore. She promised she would get him out. He told her in his arms was the only place he wanted to be. He urged her to "fuckin' do this baby." She again promised she would.
>
> Shortly after that phone call, E. contacted the police department and told them she wanted to change her story, and what they had in their report was not accurate. She also contacted the district attorney's office and informed them she had lied in the report. Although E. had earlier contact with law enforcement after the incident between herself and defendant, she did not indicate she wanted to recant her statements or had lied in her statements until after the September 9 phone call with defendant; a phone call in which he encouraged her to not cooperate with law enforcement and cajoled her by promising to marry her, but only if she could get him out of jail by not cooperating with law enforcement. It was reasonable to infer from this evidence, that defendant's statements telling her not to cooperate with law enforcement and promising to marry her but only if she got him out of jail were intended to, and did, cause E. to recant her statements to law enforcement, and later, to refuse to testify despite a grant of immunity.

Id. at 469-70.

The California court found that this evidence, as well as other similar evidence, was sufficient to support the trial court's determination that the defendant had engaged in wrongdoing and therefore forfeited his claim that his constitutional right to confront the witness. In reaching this decision, the court

> recognize[d] defendant's statements here were not explicitly threatening or directive. However, consistent with the broad construction of the elements required for the application of this

> doctrine, and the underlying purpose to prevent defendant from undermining the judicial process, we do not find such explicit behavior to be necessary. *This view is particularly apt in the context of domestic violence offenses and abusive relationships, which typically include an element of inherent psychological coercion, and the reality that "[t]his particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that [the witness] does not testify at trial."* (*Davis v. Washington* (2006) 547 U.S. 813, 832-833, 126 S.Ct. 2266, 165 L.Ed.2d 224.)
>
> Whether a defendant's conduct constitutes "wrongdoing" depends not necessarily on its character, but on the defendant's intent and whether his actions caused the witness not to appear. *It is true that most of the reported cases involving this exception to the Confrontation Clause involve serious criminal conduct*, but that does not preclude courts from finding that nonthreatening conduct such as occurred here qualifies as wrongdoing under the appropriate legal standard where the defendant acted with the intent to procure the witness's absence from court.

264 Cal. Rptr. at 471 (emphasis added); s*ee also State v. Hallum*, 606 N.W.2d 351, 358 (Iowa 2000) (finding forfeiture by wrongdoing where defendant, asserting his influence over his step-brother who was a co-defendant and had agreed to testify against the defendant, sent letters to his half-brother advising him to persist in not testifying, to "hang in there" and "calm down," but made no actual threats.).

Interestingly, in her dissenting opinion in *Reneaux*, Justice Elena J. Duarte, found the defendant's conduct insufficient to warrant a forfeiture of his constitutional right to confront his accuser, despite the crime involved being inextricably connected with domestic violence. *See* 264 Cal.Rptr.3d at 478 (Duarte, J., dissenting). Justice Duarte

criticized the court for finding that two brief excerpts of phone calls, separated by four months, and which were nonthreatening and not in violation of any no-contact order rose to a sufficient level to warrant forfeiture of "a bedrock constitutional right." *Id.* at 479. Instead, Justice Duarte stated that the defendant's conduct simply did not compare to the type of conduct other courts had found sufficient to find that a constitutional right was forfeited. Specifically:

> In the all-too-typical case involving forfeiture by wrongdoing, the defendant prevents a witness from testifying or cooperating with law enforcement by *killing* the witness before trial. (See, e.g., *Giles v. California* (2008) 554 U.S. 353, 356, 128 S.Ct. 2678, 171 L.Ed.2d 488; *People v. Kerley, supra*, 23 Cal.App.5th at pp. 556-557, 233 Cal.Rptr.3d 135; *People v. Banos* (2009) 178 Cal.App.4th 483, 485, 100 Cal.Rptr.3d 476; *United States v. Cazares* (9th Cir. 2015) 788 F.3d 956, 975; *United States v. Jackson* (4th Cir. 2013) 706 F.3d 264, 265; *United States v. Dhinsa* (2d. Cir. 2001) 243 F.3d 635, 652; *United States v. Cherry* (10th Cir. 2000) 217 F.3d 811, 814-815; *United States v. Emery* (8th Cir. 1999) 186 F.3d 921, 926; *United States v. Houlihan* (1st Cir. 1996) 92 F.3d 1271, 1279; *United States v. White* (D.C. Cir. 1997) 116 F.3d 903, 911.) But on occasion the definition of wrongful conduct has been expanded to include threats, intimidation, and bribery. (See, e.g., *United States v. Johnson* (9th Cir. 2014) 767 F.3d 815, 818 [death threats]; *People v. Jones* (2012) 207 Cal.App.4th 1392, 1399, 144 Cal.Rptr.3d 571 [threat of violence] (*Jones*); *United States v. Jackson, supra*, 706 F.3d at p. 267, citing *United States v. Carlson* (8th Cir. 1976) 547 F.2d 1346, 1358-1359 [intimidation]; *State v. Mechling* (2006) 219 W.Va. 366, 633 S.E.2d 311, 326 [physical violence]; *People v. Geraci* (1995) 85 N.Y.2d 359, 625 N.Y.S.2d 469, 649 N.E.2d 817, 823-824 [bribery].) Where there is a history of domestic violence, repeated violations of court orders during jail visits and phone calls may also constitute wrongful conduct. (See *United States v. Montague* (10th Cir. 2005) 421 F.3d 1099, 1102-1104.) Prior to *Crawford*, wrongful conduct had "also been held to include persuasion and control by a defendant, the

> wrongful nondisclosure of information, and a defendant's direction to a witness to exercise the fifth amendment privilege." (*Steele v. Taylor* (6th Cir. 1982) 684 F.2d 1193, 1201, disapproved on another point in *Burns v. Estelle* (5th Cir. 1983) 695 F.2d 847.)
>
> Here, defendant displayed *none* of these tactics. As the majority agrees, the defendant's conduct was neither threatening nor in violation of a court order. . . . And although *Crawford* accepted the doctrine of forfeiture by wrongdoing as an equitable doctrine (see *Crawford*, *supra*, 541 U.S. at p. 62, 124 S.Ct. 1354), the Court also reaffirmed therein *the importance of the constitutional right to confront one's accuser by severely limiting those circumstances under which that right could be circumvented. Regardless of the effect of Crawford on the doctrine at issue here, the majority has not cited (and I have not found) any case that has applied the doctrine to the type of conduct seen here*[.]

Reneaux, 264 Cal.Rptr.3d at 479-80 (some emphasis added) (footnote omitted); *see Commonwealth v. Edwards*, 830 N.E.2d 158, 168-69 (Mass. 2005) (adopting the doctrine of forfeiture by wrongdoing, finding that the doctrine may be applicable to cases in which the defendant colluded with a witness to plan for the witness's unavailability, and stating that "[w]ithout question, the doctrine should apply in cases where a defendant murders, threatens, or intimidates a witness in an effort to procure that witness's unavailability. Similarly, forfeiture will be triggered where a defendant commits a criminal act, such as a violation of our witness tampering statute, G.L. c. 268, § 13B, in order to procure the witness's unavailability.") (footnotes omitted).

Given the dearth of legal support for the majority's conclusion that wrongdoing existed in this case sufficient to find the petitioner forfeited his Sixth Amendment right to confront witnesses, I am baffled by the majority's willingness to ignore Justice Scalia's admonishment in *Giles*. The majority has pulled the plug on any notion of fairness in its determination that these rather benign, nonthreatening statements made by the petitioner to his co-defendant constituted wrongdoing sufficient to forfeit his constitutional right to confront the witnesses against him.

For all the foregoing reasons, I respectfully dissent.

COPY

STATE OF WEST VIRGINIA

At the Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on the 21st day of September, 2021, the following order was made and entered:

State of West Virginia,
Plaintiff Below, Respondent

vs.) No. 19-1102

Gerald Wayne Jako, Jr.,
Defendant Below, Petitioner

ORDER

The Court, having maturely considered the petition for rehearing filed by the petitioner, Gerald Wayne Jako, Jr., by Robert F. Evans, his attorney, is of opinion to and does refuse said petition for rehearing.

A True Copy

Attest: /s/ Edythe Nash Gaiser
Clerk of Court