No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TELLY HANKTON, also known as Third Hankton, also known as Wild Hankton;
WALTER PORTER, also known as Moonie Porter, also known as Eurkel Porter;
KEVIN JACKSON; **ANDRE HANKTON**,

Petitioner,

Versus

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Submitted by:
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QUESTION PRESENTED

The Sixth Amendment's Confrontation Clause forbids the use of prior testimonial statements that were not subject to cross examination against a defendant at a criminal trial unless those statements fall into one of the narrow exceptions. In this case, the district court permitted the prior grand jury statements of Hasan Williams identifying Telly Hankton has the killer of Jesse Reed under the forfeiture-by-wrongdoing exception to the Confrontation Clause. Within days of Hasan Williams' grand jury testimony, a man named Walter Porter killed Hasan Williams. Telly Hankton was in jail at the time of Williams' killing and did not know that Williams had spoken to police or testified before the grand jury. Nonetheless, the district court found that Williams' grand jury statements against Telly Hankton could be used against him at his trial, because he had "acquiesced in wrongfully causing" Williams' unavailability as a witness, and did so intending that result. To address the lack of evidence of forfeiture by wrongdoing, the government's argument in the district court relied upon conspiracy liability theory, a doctrine which has split the federal circuit courts. Considering the dearth of evidence establishing the Confrontation exception of forfeiture by wrongdoing and the government's reliance on conspiracy liability theory in the district court, this case thus presents the following question:

1. By what standard of proof does the Sixth Amendment permit the admission at trial of prior testimonial statements under the forfeiture by wrongdoing exception to the Confrontation Clause?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Telly Hankton respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in *United States of America v. Telly Hankton, et al*, 51 F. 4th 578 (5th Cir. 2022).

PROCEEDINGS BELOW

Telly Hankton was convicted and sentenced in the United States District Court for the Eastern District of Louisiana in *United States v. Telly Hankton, et al*, in district court case number, 2:12-cr-00001. Direct review on appeal by the United States Court of Appeals for the Fifth Circuit (Appendix "A") is reported at *United States of America v. Telly Hankton, et al*, 51 F. 4th 578 (5th Cir. 2022).

STATEMENT OF JURISDICTION

The judgement and opinion of the United States Court of Appeals for the Fifth Circuit affirming in part and vacating in part Telly Hankton's convictions was entered on October 14, 2022. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

Sixth Amendment to the U.S. Constitution:

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.

Federal Rule of Evidence 804(b)(6):

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. 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.

STATEMENT OF THE CASE

The subject of this Petition concerns one of three murders the government alleged Telly Hankton committed in relation to a lengthy and broad conspiracy case.[1] This Petition concerns the admission of prior testimonial statements of Hasan Williams which were admitted at trial against Telly Hankton for the murder of Jesse Reed under the doctrine of forfeiture by wrongdoing.

From the early-2000s on, a local media frenzy[2] fueled the regional lore about Telly Hankton, an influential drug dealer in Central City New Orleans whom local authorities were desperate to bring down. So desperate were they that at least one

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[1] The record in this case is approximately 20,000 pages, and the government's evidence at trial covered events spanning 20 years in what it labeled a conspiracy involving a well-known family in Central City New Orleans.

[2] *See* Exhibits at ROA.959, ROA.1010-1985, documenting over 1,000 pages of articles and community commentary about Telly Hankton.

authority, disgraced former New Orleans Police Detective Desmond Pratt, now the focus of a years-long federal Civil Rights investigation, manufactured false eyewitness evidence in one of the murders in this case—the murder of Jesse Reed. But the full extent of Pratt's influence on that investigation, or any other investigation related to this case, was never uncovered. The defense's attempts to investigate this critical question— did authorities manufacture false witness testimony against Telly Hankton?—were cut off, stymied, or concealed due to the ongoing investigation.

The nature of the case required rigorous testing of the government's evidence through cross-examination, and the need to cross examine these particular prior sworn statements was critical. Prior to trial, the government first disclosed to the defense information regarding an ongoing federal Civil Rights investigation into former New Orleans Police Department Detective Desmond Pratt. ROA.3032. The disclosure and subsequent investigation showed that Pratt, who was the lead detective in the Jesse Reed murder investigation, had fabricated witness testimony in that case. ROA.3032. Pratt was also later discovered to have close personal ties to two victims in this case, Jesse Reed and Hasan Williams, the extent of which was never fully revealed. *See* ROA.6520-21. From the time of the disclosure of information about Pratt's fraud, Telly Hankton's defense counsel sought to obtain as much information as possible about Pratt's manufacturing of evidence—seeking documents and testimony to determine whether Pratt had a hand in any of the other murder investigations in this case, and whether the fraudulent evidentiary

practices he engaged in were limited to him alone or whether they extended to his colleagues. *See* ROA.8079-84, ROA.3445.

At trial, Mr. Hankton called Pratt to the stand as part of his defense. Pratt invoked his rights under the Fifth Amendment, to questions like whether he framed Telly Hankton in the murder of Jesse Reed, whether he had prior relationships with Jesse Reed and Hasan Williams, whether he had interviewed Hasan Williams on the night of the Jesse Reed homicide, and many others. ROA.13151, *et seq*.

Mr. Hankton moved prior to trial to suppress the identifications made by Hasan Williams in the Jesse Reed homicide—acknowledging that the defense had just received disclosures related to the misconduct and fraud perpetrated by former Detective Pratt. ROA.4194. The two identifications in the Jesse Reed homicide were both made by Hasan Williams—first to police, and several days later to a Louisiana state grand jury—who testified that he had seen Telly Hankton kill Jesse Reed. ROA.4894-95. The defense believed that Hasan Williams had been in contact with Pratt before he made his initial statements to police, but they were never able to uncover sufficient proof. *See* ROA.6520-21. Several days after his grand jury testimony, Hasan Williams was killed by Walter Porter. *See* ROA.5168. The defense requested a hearing on the Motion to Suppress, on grounds that more information was needed to establish that the procedures leading to the identifications had been suggestive and the identifications themselves were unreliable. ROA.3375. The District Court did not hold a hearing and decided these motions on the pleadings alone, denying both. ROA.4178, 4276.

Telly Hankton then opposed the government's motion to introduce the prior sworn testimony of Hasan Williams, on grounds that the evidence violated his Sixth Amendment right to confront witnesses against him. ROA.4451. The district court admitted this evidence under the forfeiture by wrongdoing exception. ROA.4900. Thus Hasan Williams' testimony—the only direct evidence linking Telly to this crime, went uncontradicted at trial.

After trial, Telly moved for a judgment of acquittal and for a new trial. ROA.6509, 8062. Both were denied by the court. ROA.8333. Telly was sentenced to a term of life imprisonment on Counts 1, 2, 5, 6, 7, 8, 10, and 11, and 240 months on Count 3. ROA.14184. Finally, the court ordered restitution without a hearing on the matter, ordering that Telly was liable to one of the victims for $1.6 million. ROA.58921. The United States Court of Appeal for the Fifth Circuit vacated and remanded the $1.6 million restitution order and vacated and remanded Telly's § 924 convictions under Counts 3, 6, 8, and 11.[3] Exhibit A, *U.S. v. Hankton*, at p. 48. Telly's remaining convictions were affirmed.

REASONS FOR GRANTING, VACATING, AND REMANDING

A. The admission of these prior testimonial statements at trial under the doctrine of forfeiture by wrongdoing pursuant to Fed. R. Evid. 804(b)(6) obliterates any standard of proof which might be required under the Sixth Amendment.

[3] Count 3, conspiracy to possess firearms; Count 6, murder of Darvin Bessie with the use of a firearm; and Count 8, murder of Darnell Stewart with the use of a firearm.

While this Court has not explicitly ruled on the preponderance standard for the admission of forfeiture-by-wrongdoing evidence, it has recognized that the majority of federal and state courts apply the preponderance of the evidence standard.[4] This case presents an opportunity for this Court to recognize and enforce a standard of evidence required by the Sixth Amendment to the United States Constitution, because the government's evidence failed to establish the forfeiture-by-wrongdoing exception to the Confrontation Clause by any standard of proof.

B. Background.

Because the critical issue here concerns the government's burden of proof in establishing the forfeiture by wrongdoing exception to the Confrontation Clause, this section addresses the evidence the government offered. The government here sought to introduce Hasan Williams' prior testimonial statements at trial against Telly Hankton, and the district court granted oral argument on the topic of Hasan Williams' identifications of Telly Hankton. ROA.4303, hearing at ROA.9008. The government alleged that Telly Hankton had forfeited his Sixth Amendment right to confrontation because he "caused – or acquiesced in causing" Hasan Williams' unavailability as a witness, "and did so intending the result." *See* Fed. R. Evid. 804(b)(6). Because there was no evidence that Telly Hankton was involved in the murder of Hasan Williams—Telly was in jail at the time of Hasan Williams' murder

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[4] *Davis v. Washington*, 547 U.S. 813, 833 (2006). At the state level, Maryland, New York, and Washington use the clear and convincing standard. Md. Code Ann., Cts. & Jud. Proc. §10-901 (West 2011); *People v. Geraci*, 85 N.Y. 2d 359, 649 (1995); *State v. Mason*, 160 Wash. 2d 910 (2007).

and there was no evidence that Telly ever knew that Mr. Williams had spoken to the police—the government relied upon what it called "common-sense inferences" to attempt to establish its burden of proof. ROA.4309. In addition, the government relied upon the application of conspiracy liability theory to the doctrine of forfeiture by wrongdoing. ROA.4311 *et seq.*

In opposition and at oral argument, Telly Hankton's counsel urged to the that the paramount issue was the reliability of this evidence. ROA.4455, ROA.4451. The defense pointed out that the government had not met the burden of proof by a preponderance[5] because this exception requires that the government establish that the defendant had a purpose of excluding the absent witness' testimony, and there was no evidence that Telly knew that Hasan Williams had spoken to the police. ROA.9018.[6] In response to this, the government pointed to Hasan Williams' statements that he and Telly had known each other for years, and the government inferred that because Williams claimed to have seen Telly, Telly must have also seen Williams.

The district court adopted this argument and found that it was "more likely than not that Hankton clearly recognized Williams, as well." ROA.4900. To support its conclusion that Telly Hankton must have had something to do with Hasan

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[5] The defense also argued that a higher burden of proof than a mere preponderance should be required when a defendant's confrontation rights are at issue. ROA.4455, ROA.4451.

[6] The government's only other link was that the ballistic evidence connected the Jesse Reed homicide to the Hasan Williams homicide, as the government alleged that Walter Porter committed both.

Williams' murder when he was in jail at the time, the district court also adopted the government's authority applying conspiracy liability to the doctrine of forfeiture by wrongdoing. The court then ruled that the government had satisfied its preponderance burden under Rule 804(b)(6). ROA.4900.

1. **If the government's evidence here can establish forfeiture by wrongdoing, future courts will have no barrier to disposing of a criminal defendant's Confrontation Rights.**

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This Court has referred to this right as a "bedrock procedural guarantee," and has stated that "the absence of proper confrontation at trial calls into question the ultimate integrity of the fact-finding process." *Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (internal quotations omitted) (abrogated on other grounds by *Crawford v. Washington*, 541 U.S. 36 (2004)). When the Framers incorporated this protection into the Sixth Amendment, "the principle 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.[7]

[7] "Confrontation Clause objections that were properly raised at trial are reviewed de novo, subject to harmless error analysis." *United States v. Acosta*, 475 F.3d 677 (5th Cir. 2007). As to the erroneous admission of statements in violation of the Confrontation Clause, the appellate court analyzes whether the "admission was harmless beyond a reasonable doubt. *See Hafdahl v. Johnson*, 251 F. 3d 528, 539-40 (5th Cir. 2001). To determine whether the error was harmless, 'we consider the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross- examination otherwise permitted, and of course, the overall strength of the prosecution's case.' *Id.* (citation omitted)." *U.S. v. Edwards*, 303 F.3d 606 (5th Cir. 2002).

This Court has recognized that forfeiture by wrongdoing constitutes one of the two common-law exceptions to the Confrontation Clause. *Giles v. California,* 554 U.S. 353 (2008).[8] In *Giles*, the Court examined early common law cases applying this exception and concluded that the purpose of the defendant's wrongful conduct must have been to make the witness unavailable. *Id.* Only those exceptions to the confrontation right that were established at the time of the founding may limit the scope of the right today. *Crawford*, 541 U.S. at 37. This exception "permitted the introduction of statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant." *Giles*, 554 U.S. at 359.

The forfeiture doctrine has been codified in Federal Rules of Evidence 804(b)(6). *Davis*, 547 U.S. at 833. Under Rule 804(b)(6), a party may seek to introduce "[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." Fed. R. Evid. 804(b)(6). The exception sets forth two requirements: first, that the witness is unavailable due to some action or inaction by the defendant, and second, that the action or inaction by the defendant was taken with the intent to cause the unavailability of the witness. This Court's historical review of the use of the forfeiture doctrine suggests "that the exception applied only when the defendant engaged in conduct designed to prevent the witness from testifying." *Giles*, 554 U.S. 359 (emphasis omitted).

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[8] The other exception: "declarations made by a speaker who was both on the brink of death and aware that he was dying." *Giles*, *supra*, slip op. p. 4.

The government here did not satisfy its burden of meeting these requirements. The government had no evidence that Telly Hankton was involved in the murder of Hasan Williams. Telly was in jail at the time of Williams' homicide, and he was not charged with any involvement in the Williams homicide. Even taking as truth Williams' grand jury testimony that he saw Telly shoot Jesse Reed—there was no evidence that Telly knew Hasan Williams had spoken to police. The court's conclusion that "it is more likely than not that Hankton clearly recognized Williams, as well," does not satisfy the requirement of proof that Mr. Hankton "caused" or "acquiesced" in Williams' unavailability.

The cases in this area show that there must be some evidence that the person who forfeits his Confrontation rights had at least some knowledge that the person had spoken to the police—knowledge of this sort is **required** to prove that there was intent to prevent the witness from testifying. In *Giles v. California*, this Court recognized that forfeiture by wrongdoing is a valid exception to the Confrontation Clause because it was recognized as such at the time of the ratification of the Sixth Amendment. *See also Crawford*, *supra*. But the Court made clear that the exception required a showing that there was a purpose "to prevent a witness from testifying." *Giles* at 358, 368 (*quoting Crawford* at 54). The government here had no such evidence, instead relying on conjecture—based on the statement of someone whose testimony was already in question. The district court declined to address this aspect of the law in its order, but the court did ask the government about it at the hearing: "No knowledge of his NOPD statement, no knowledge of his grand jury statements,

how do you react to that?" ROA.9023. The government gave a circular response: "Hasan Williams clearly knew Telly Hankton, identified him immediately after the murder. Hasan Williams knows Telly Hankton. Telly Hankton knows Hasan Williams." ROA.9023. This, on its own, is not enough to satisfy the government's burden of proof.

To the extent that the district court's ruling concluded that the test for forfeiture by wrongdoing was met by the government's evidence, it was an abuse of discretion which resulted in a violation of Telly's Sixth Amendment right to confront witnesses against him. [9] Moreover, this Sixth Amendment violation resulted in substantial prejudice: Telly did not ever have the opportunity to challenge Hasan Williams' assertions. He was never able to challenge the reliability of this statement on the basis of whether or not Desmond Pratt had fabricated evidence related to him in the Jesse Reed homicide: he was not able to put forth his case through the testimony of Pratt himself, who invoked his right against self-incrimination at trial, and he could not cross-examine these out-of-court testimonial statements at trial. And as noted above, Mr. Williams' statements were the only direct evidence linking Telly to the Jesse Reed homicide. Accordingly, the error was not harmless.

2. If the government's evidence here can establish forfeiture by wrongdoing, future courts may apply the theory of conspiracy liability in this area, an issue for which there is no consensus among Federal Circuit Courts.

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[9] On appeal, the Fifth Circuit determined that "[t]he district court's conclusion that Telly, at the very least, 'acquiesced in wrongfully causing . . . [Williams's] unavailability as a witness, and did so intending that result,' Fed. R. Evid. 804(b)(6), was not based on 'a clearly erroneous assessment of the evidence,' *Gurrola*, 898 F.3d at 533. We therefore find no abuse of discretion. *United States v. Hankton*, 51 F. 4th 578, 599 (5th Cir. 2022).

It is under these circumstances—the utter lack of evidence that Telly had anything to do with the Williams homicide— that the discussion of conspiracy liability becomes relevant. The district court's ruling appears to tangentially apply conspiracy liability to get the government's evidence over the line on the burden of preponderance of the evidence. The district refers to the doctrine only in a footnote—explaining that Mr. Hankton being in jail at the time of Williams' murder did not mean that he had not forfeited his Confrontation rights. ROA.4899. But because the government's evidence of forfeiture by wrongdoing was inadequate, the only way it could reach its burden of proof was through the application of conspiracy liability, as it explained and relied on in its briefing on the motion. *See* ROA.4311. The government pointed to support for the doctrine in the Fourth Circuit:

> The Fourth Circuit has also applied conspiracy liability to a Rule 804(b)(6) situation, undermining any argument that Williams' statements should not be admissible against Hankton because Hankton was in jail when Porter murdered Williams on his behalf. *See United States v. Dinkins*, 691 F.3d 358, 384 (4th Cir. 2012) (holding that "traditional principles of conspiracy liability are applicable within the forfeiture by wrongdoing analysis"). In applying *Pinkerton* to Rule 804(b)(6), the Fourth Circuit recognized that the Rule provides that the statement can be offered against a party that "wrongfully caused- or acquiesced in wrongfully causing-the declarant's unavailability." *Id.* The Fourth Circuit specifically rejected an argument that the unavailable witness's statements should not be admitted against the defendant because the defendant was in jail at the time the witness was killed. *Id.*; *see also United States v. Cherry*, 217 F.3d 811, 820 (10th Cir. 2000). That same reasoning should apply here. ROA.4266.

This expansion of the exception of forfeiture by wrongdoing was not recognized at the time of the framing of the Sixth Amendment. *See Crawford*, *supra*, *and see* Petroni, *Constitutional Limits on Evidentiary Forfeiture Among*

Conspirators, *supra.* Insofar as the District Court applied the doctrine of conspiracy liability in this case, it did so in violation of Mr. Hankton's Sixth Amendment right to confront witnesses against him.[10]

Moreover, the evidence here was so scant that it does not satisfy the burden of proof even when applying the conspiracy liability theory. The relevant facts of *United States v. Dinkins*, the primary case that the government cited to support the application of "conspiracy liability to a Rule 804(b)(6) situation," show a completely different set of circumstances than those that exist in this case. 691 F. 3d 358 (4th Cir 2012). In *Dinkins*, the Fourth Circuit approved of the trial court's admission of the hearsay testimony of a dead cooperating witness. Dinkins denied participating in any wrongdoing that led to the witness' death, and asserted that he had been in jail at the time of the witness's murder. *Id.* at 384. But there was evidence in that case that Dinkins had killed another individual who "was widely believed" to have "cooperated with law enforcement[.]" *Id.* at 364. Then the witness at issue "became widely known as a 'snitch.'" *Id.* In advance of that witness's testimony at an upcoming trial, Dinkins told another organizational member "that they had been 'nominated to kill'" the witness, and later that day Dinkins and his co-conspirator

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[10] The Fifth Circuit disagreed, ruling, "[Telly] takes issue with a footnoted remark in the district court's order admitting the evidence that the Fourth Circuit "has applied conspiratorial principles to the forfeiture [by wrongdoing] doctrine, explicitly rejecting the argument that a defendant could not participate in a murder to silence a witness because the defendant was in prison at the time of the murder." (Citing *United States v. Dinkins*, 691 F. 3d 358 (4th Cir. 2012)). But the district court's ruling turned not on the Fourth Circuit's conspiratorial liability approach, but on the facts detailed above. The district court's reference to conspiratorial liability merely bolstered its conclusion that Telly's imprisonment at the time Williams was murdered did not preclude a finding that Telly caused or acquiesced in Williams's murder. *See* Fed. R. Evid. 804(b)(6) In short, we perceive no reversible error in the district court's admission of Williams's recorded statement or his state grand jury testimony into evidence.

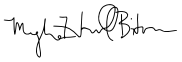
"fired more than a dozen shots at" the witness, "striking him multiple times." *Id.* Upon learning that the witness had not died as a result of the attempted murder, Dinkins told his colleague "'We have to go to the hospital to finish him off." *Id.* The court noted additional evidence regarding Dinkins' connection to the specific intention of preventing a witness from testifying, and noting that Dinkins' shooting of the witness at issue and his stated intention to "'finish him off'" were actions that "substantiate the ongoing nature of [the organization's] scheme to murder [the witness]." *Id.*

In this case, there was no evidence that Telly Hankton or anyone else knew that Hasan Williams was cooperating with law enforcement. There was no evidence that Williams had testified against him or spoken to police about him in any events in the past. Furthermore, Telly was not charged by the grand jury with any act related to Williams' murder. The District Court's finding that Telly had forfeited his Confrontation rights pursuant to any consideration of conspiracy liability was an abuse of the court's discretion. Accordingly, Telly requests that this Court consider the question of the propriety of applying—either directly or tangentially—the theory of conspiracy liability in the application of the forfeiture by wrongdoing exception to the Confrontation Clause.

CONCLUSION

For the reasons set out above, Telly Hankton respectfully requests that this Court grant his Petition for Certiorari.

Respectfully submitted,



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JANUARY 2023

APPENDIX