

PRELIMINARILY GUILTY? REFLEXIVE CONFRONTATION FORFEITURE

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I. INTRODUCTION

A criminal defendant forfeits the constitutional right to confront a witness if the defendant purposefully prevents the witness from testifying at trial.¹ The rule “*is* applicable to a missing witness’s statements even in a trial for murdering that witness”² The application of the rule in these types of cases has been referred to as reflexive forfeiture.³ In such cases, the alleged misconduct causing confrontation forfeiture is the same underlying act for which a defendant is criminally charged.⁴ This creates a potential conundrum because the doctrine applies only if the trial judge makes “a preliminary finding of fact that the defendant’s wrongful conduct prevented the witness’s testimony.”⁵ In other words, a trial judge inescapably must make a preliminary determination regarding a defendant’s ultimate guilt whenever reflexive confrontation forfeiture is at issue.⁶

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1. *Giles v. California*, 554 U.S. 353, 359-68 (2008).

2. *United States v. Johnson*, 354 F. Supp. 2d 939, 964 (N.D. Iowa 2005) (emphasis added), *aff’d in part*, 495 F.3d 951 (8th Cir. 2007); *see also* *Gonzalez v. State*, 195 S.W.3d 114, 125 (Tex. Crim. App. 2006); *cf.* *United States v. Garcia-Meza*, 403 F.3d 364, 370-71 (6th Cir. 2005) (finding that a defendant forfeited the right to confront his deceased wife at his trial for her murder), *abrogated in part by* *Giles*, 554 U.S. at 359-68 (recognizing a motive requirement that was rejected in *Garcia-Meza*); *but see* *United States v. Jordan*, No. CRIM. 04-CR-229-B, 2005 WL 513501, at *6 (D. Colo. Mar. 3, 2005) (asserting that the court could find of no cases “holding that a murder whose *by-product* is the unavailability of a witness *to that killing* is covered by the rule.”).

3. *State v. Dobbs*, 320 P.3d 705, 714 (Wash. 2014) (Wiggins, J., dissenting); *State v. Jensen*, 727 N.W.2d 518, 533 (Wis. 2007), *abrogated in part by* *Giles*, 554 U.S. at 359-68 (narrowing the forfeiture doctrine adopted in *Jensen*). The label “reflexive forfeiture” was coined in, Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 508 (1997), to describe situations where the forfeiture doctrine is applied “when the act that rendered the declarant-victim unable to testify was the same criminal act for which the accused is now on trial.”

4. *See* *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999); *People v. Moore*, 117 P.3d 1, 5 (Colo. App. 2004); *State v. Meeks*, 88 P.3d 789, 794 (Kan. 2004), *overruled on other grounds by* *State v. Davis*, 158 P.3d 317, 322 (Kan. 2006), and *abrogated in part by* *State v. Belone*, 285 P.3d 378, 382 (Kan. 2012).

5. *Dobbs*, 320 P.3d at 714 (Wiggins, J., dissenting).

6. *Id.* at 714-15.

Requiring a judge to decide “the very question for which the defendant is on trial may seem, at first glance, troublesome.”⁷ It may be argued that reflexive forfeiture creates a circular trap. “Anytime a set of uncontroverted, extrajudicial statements tend both to incriminate the defendant and establish grounds for forfeiture, that defendant could lose any opportunity to challenge their accuracy and truthfulness through cross-examination.”⁸ A majority of courts have nonetheless resolved that a court may make a preliminary finding for purposes of confrontation forfeiture even though a jury will ultimately decide the same issue when reaching its verdict.⁹ Comments made by a plurality in *Giles v. California*¹⁰ indicate that the United States Supreme Court likely accepts the majority rule. Justice Scalia wrote in a footnote in which he was joined by three other justices that:

We do not say, of course, that a judge can never be allowed to inquire into guilt of the charged offense in order to make a preliminary evidentiary ruling. That must sometimes be done under the forfeiture rule that we adopt—when, for example, the defendant is on trial for murdering a witness in order to prevent his testimony.¹¹

Justice Breyer expressed apparent approval of this proposition in his dissenting opinion in which two other justices joined, writing that “[w]e have previously said that courts may make preliminary findings of this kind And even the plurality is forced to admit that it is ‘sometimes’ necessary for a ‘judge . . . to inquire into guilt of the charged offense in order to make a preliminary evidentiary ruling.’”¹²

A minority of courts have strongly disagreed. Federal District Court Judge Gerald Lee refused to allow reflexive forfeiture in *United States v. Lentz*,¹³ explaining:

In this case for which Defendant is being tried under well settled Constitutional principles, Defendant is presumed to be innocent until proven guilty. To hold otherwise would be to deprive a defendant of his right to a jury trial and allow for a judge to preliminarily convict a defendant of the crime on which he was charged.¹⁴

7. *United States v. Mayhew*, 380 F. Supp. 2d 961, 967 (S.D. Ohio 2005).

8. *Dobbs*, 320 P.3d at 714-15 (Wiggins, J., dissenting).

9. *See e.g., Jensen*, 727 N.W.2d at 532-35 (Wis. 2007) (discussing authorities), *abrogated in part by Giles*, 554 U.S. at 359-68.

10. 554 U.S. 353 (2008).

11. *Giles*, 554 U.S. at 375 n.6 (plurality opinion).

12. *Id.* at 403 (Breyer, J., dissenting).

13. 282 F. Supp. 2d 399 (E.D. Va. 2002).

14. *United States v. Lentz*, 282 F. Supp. 2d 399, 426 (E.D. Va. 2002), *aff'd on other grounds*, *United States v. Lentz*, No. 02-19, 2003 WL 253949 (4th Cir. Feb. 6, 2003); *see also People v. Maher*, 677 N.E.2d 728, 731 (N.Y. 1997) (expressing concerns about using a forfeiture hearing to “decide the ultimate question for the jury in the same case . . .”).

Washington State Supreme Court Justice Richard Sanders expressed those same concerns in *State v. Mason*,¹⁵ concluding that “[i]t makes no sense for the evidentiary rules of trial to depend upon the court’s pretrial determination of the defendant’s guilt or innocence.”¹⁶ Sanders wrote that reflexive forfeiture illogically invades upon the province of the jury by forcing a judge to determine a defendant’s guilt prior to trial.¹⁷ Washington Supreme Court Chief Justice Gerry Alexander agreed with Justice Sanders that “the doctrine should be eschewed” when the alleged conduct that rendered a victim/witness unavailable forms the basis for the charge against a defendant.¹⁸ Justice Alexander wrote that “[f]or a trial court to determine, during the trial, that the defendant has committed the charged crime, albeit by a standard less than ‘beyond a reasonable doubt,’ is offensive to the presumption of innocence that must prevail throughout the trial.”¹⁹

These concerns find some support in *Giles*. Justice Scalia wrote for the plurality in *Giles* that it was satisfied that the purpose requirement adopted by the majority avoided unconstitutional infringement upon a defendant’s right to a jury trial.²⁰ However, the plurality also indicated that it would be “repugnant to our constitutional system of trial by jury” if judges were generally allowed based upon preliminary evidentiary rulings to strip a person of “the right to have his guilt in a criminal proceeding determined *by a jury*, and on the basis of evidence the Constitution deems reliable and admissible.”²¹

This article examines the constitutionality of reflexive forfeiture.

II. MAJORITY RULE

Tony Emery was convicted in the United States District Court for the Western District of Missouri of killing Elkins, a federal informant, based in part on out-of-court statements made by the informant.²² Emery contended on appeal that principles of forfeiture-by-wrongdoing “should apply only in a trial on the underlying crimes about which

A later judge in *Lentz* ruled that the holding on this point was abrogated by the Fourth Circuit’s decision in *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005). *United States v. Lentz*, 384 F. Supp. 2d 934, 940-42 (E.D. Va. 2005); *see also* *United States v. Lentz*, 524 F.3d 501, 526-29 (4th Cir. 2008).

15. 162 P.3d 396 (Wash. 2007).

16. *State v. Mason*, 162 P.3d 396, 412 (Wash. 2007) (Sanders, J., dissenting); *see also* *United States v. Mikos*, No. 02-CR-137-1, 2004 WL 1631675, (N.D. Ill. Jul. 16, 2004) (expressing concerns that reflexive forfeiture is a “slippery slope” for trial rights).

17. *Mason*, 162 P.3d at 412 (Sanders, J., dissenting).

18. *Id.* at 410 (Alexander, C.J., concurring in result).

19. *Id.*

20. *Giles*, 554 U.S. at 374-75 (plurality opinion).

21. *Id.* at 374, 375 (plurality opinion) (emphasis added).

22. *See* *United States v. Emery*, 186 F.3d 921, 924, 926 (8th Cir. 1999).

he feared Ms. Elkins would testify, not in a trial for murdering her.”²³ The United States Court of Appeals for the Eighth Circuit rejected that argument, explaining that:

The rule contains no limitation on the subject matter of the statements that it exempts from the prohibition on hearsay evidence. Instead, it establishes the general proposition that a defendant may not benefit from his or her wrongful prevention of future testimony from a witness or potential witness. Accepting Mr. Emery’s position would allow him to do just that.²⁴

Reginald Meeks argued in the appeal of his conviction for murdering James Green that the trial court erred by admitting Green’s statement to police that “Meeks shot me.”²⁵ The Kansas Supreme Court held in *State v. Meeks*²⁶ that reflexive forfeiture posed no problem, writing:

If the trial court determines as a threshold matter that the reason the victim cannot testify at trial is that the accused murdered her, then the accused should be deemed to have forfeited the confrontation right, *even though the act with which the accused is charged is the same as the one by which he allegedly rendered the witness unavailable*.²⁷

Angela Johnson argued during her prosecution for murder that the forfeiture-by-wrongdoing doctrine admits only statements unrelated to the conduct for which a defendant is on trial, “or there would be a ‘murder victim’s’ hearsay exception.”²⁸ Judge Bennett of the United States District Court for the Northern District of Iowa held the

23. *Emery*, 186 F.3d at 926.

24. *Id.*; see also *State v. McLaughlin*, 265 S.W.3d 257, 272-73 (Mo. 2008) (holding that the forfeiture-by-wrongdoing doctrine applied in a defendant’s trial for murdering a witness even though the murder was committed to prevent the witness from testifying in another case); cf. *State v. Hosier*, 454 S.W.3d 883, 897 (Mo. 2015) (holding that a victim’s statements made on an application for a protection order against a defendant were admissible at his trial for her murder since he intended to cause her to be unavailable to testify).

25. *State v. Meeks*, 88 P.3d 789, 791-93 (Kan. 2004), *overruled on other grounds by State v. Davis*, 158 P.3d 317, 322 (Kan. 2006), and *abrogated in part by State v. Belone*, 285 P.3d 378, 382 (Kan. 2012).

26. 88 P.3d 789 (Kan. 2004).

27. *Meeks*, 88 P.3d at 794 (Kan. 2004) (quoting Motion for Leave to File and Brief for Law Professors Sherman J. Clark, James J. Duane, Richard D. Friedman, Norman Garland, Gary M. Maveal, Bridget McCormack, David A. Moran, Christopher B. Mueller, and Roger C. Park as Amici Curiae Supporting Petitioner, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21754958, at *24 n.16), *overruled on other grounds by Davis*, 158 P.3d at 322, and *abrogated in part by Belone*, 285 P.3d at 382; see also *Commonwealth v. Salaam*, 65 Va. Cir. 404, 412-14 (Va. Cir. Ct. 2004) (relying on *Meeks* and finding reflexive forfeiture), *aff’d*, No. 1882-05-1, 2006 WL 3589008, *4 (Va. Ct. App. Dec. 12, 2006).

28. *United States v. Johnson*, 354 F. Supp. 2d 939, 961 (N.D. Iowa 2005), *aff’d in part*, 495 F.3d 951 (8th Cir. 2007).

doctrine contains no such limitation and applies even in a trial for murder of a witness, and “not just in a trial for the underlying crimes about which the defendant allegedly feared that the missing witness would testify.”²⁹ Judge Bennett similarly held during the prosecution of Johnson’s accomplice that the forfeiture-by-wrongdoing rule contains no subject matter limitation.³⁰

The Wisconsin Supreme Court explained in *State v. Jensen*³¹ that the coincidence between the wrongful conduct causing the unavailability of a witness and the elements of the crime charged is immaterial to forfeiture analysis.³² The court noted that the identity between a victim and a declarant should not have any bearing on confrontation forfeiture.³³ The court explained that compelling public policy interests warrant broad application of the doctrine.³⁴ Therefore, the court concluded that the forfeiture-by-wrongdoing rule contains no limitation on the subject matter of the statements that may be admitted thereunder and that forfeiture may apply even when a defendant is on trial for murdering the witness whose out-of-court statements are offered into evidence.³⁵

Sheng Vang was found dead on July 18, 2004, and her estranged husband, Moua Her, was charged with murder.³⁶ Moua Her appealed the admission during trial of statements made by Vang about prior incidents of domestic abuse and argued that his constitutional right to confront witnesses had been violated.³⁷ The Minnesota Supreme Court held in *State v. Moua Her*³⁸ that confrontation forfeiture should be handled like any other admissibility question and rejected Her’s argument that reflexive forfeiture violates a criminal defendant’s presumption of innocence, writing:

At oral argument, Her argued that application of the forfeiture-by-wrongdoing doctrine in this way undermines his presumption of innocence. The applicability of the doctrine depends on a finding that Her was responsible for Vang’s

29. *Johnson*, 354 F. Supp. 2d at 964, *aff’d in part*, 495 F.3d 951 (8th Cir. 2007).

30. *United States v. Honken*, 378 F. Supp. 2d 970, 991 (N.D. Iowa 2004).

31. 727 N.W.2d 518 (Wis. 2007).

32. *See State v. Jensen*, 727 N.W.2d 518, 532-35 (Wis. 2007), *abrogated in part by* *Giles v. California*, 554 U.S. 353, 359-68 (2008); *see also State v. Mason*, 162 P.3d 396, 404-05 (Wash. 2007) (holding that forfeiture could be applied even when the court must rule on the ultimate question in a case for purposes of admissibility if a clear, cogent, and convincing evidence standard is used), *abrogated on other grounds by Giles*, 554 U.S. at 359-68, *as recognized in State v. Dobbs*, 320 P.3d 705, 709 (Wash. 2014).

33. *Jensen*, 727 N.W.2d at 533-34, *abrogated in part by Giles*, 554 U.S. at 359-68.

34. *Jensen*, 727 N.W.2d at 535.

35. *Id.*

36. *State v. Moua Her*, 750 N.W.2d 258, 262-64 (Minn. 2008), *vacated*, 555 U.S. 1092 (2009).

37. *Moua Her*, 750 N.W.2d at 262-63, 264, *vacated*, 555 U.S. 1092 (2009).

38. 750 N.W.2d 258 (Minn. 2008).

death. But Her contends that no determination can be made that he was responsible for Vang's absence until the jury has found him guilty of the murder. This argument does not preclude application of the doctrine here. In cases where the forfeiture-by-wrongdoing doctrine is at issue, the district court should resolve the matter consistent with its obligations to make determinations on the admissibility of evidence.³⁹

Moua Her was remanded following the United States Supreme Court's decision in *Giles v. California*⁴⁰ to consider whether Her killed Vang with the intent of preventing her from testifying against him.⁴¹ The Minnesota Supreme Court explained that "*Giles* requires not only that the defendant intend to kill the victim, but also that the defendant killed the victim with the intent of preventing the victim from testifying."⁴² The court implicitly adhered to its earlier ruling regarding a trial court's obligation to make coincidental admissibility determinations by remanding the case to the district court to develop a factual record and resolve whether forfeiture still applied under the *Giles* standard to possibly admit out-of-court statements made by the murder victim.⁴³

These cases are all consistent with the orthodox view adopted by the Federal Rules of Evidence. Evidence Rule 104(a) provides in pertinent part that a "court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible."⁴⁴ The orthodox view is longstanding.⁴⁵ Comments made by the Advisory Committee when recommending the rule clarify that "[t]o the extent that these inquiries are factual, the judge acts as a trier of fact."⁴⁶ This practice is also longstanding.⁴⁷ The Supreme Judicial Court of Massachusetts wrote in 1852:

39. *Moua Her*, 750 N.W.2d at 274, *vacated*, 555 U.S. at 1092.

40. 554 U.S. 353 (2008).

41. *See* *State v. Her*, 781 N.W.2d 869, 872 (Minn. 2010) (noting that the case had been returned for renewed consideration in light of *Giles*).

42. *Her*, 781 N.W.2d at 875.

43. *Id.* at 876-77.

44. FED. R. EVID. 104(a); *see generally* An Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, R. 104, 88 Stat. 1926, 1930 (1975) (adopting FED. R. EVID. 104).

45. *See generally* Edmund Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165 (1929) (examining the orthodox view); John MacArthur Maguire & Charles S. Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392 (1927) (examining the same).

46. H.R. DOC. NO. 93-46 (1973) (Communication from Chief Justice of the United States at 48); *see also* Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 188 (1969).

47. *See* SAMUEL PHILLIPPS, A TREATISE OF THE LAW OF EVIDENCE 13 (John Dunlap ed., New York, Gould, Banks & Gould 1816).

[I]t is the province of the judge, who presides at the trial, to decide all questions on the admissibility of evidence. It is also his province to decide any preliminary questions of fact, however intricate, the solution of which may be necessary to enable him to determine the other question of admissibility.⁴⁸

The Advisory Committee on the Federal Rules of Evidence relied upon *McCormick on Evidence* when making its recommendations.⁴⁹ *McCormick on Evidence* recognizes that fact questions are normally decided by a jury, but explains with respect to admissibility determinations:

Issues of fact are usually left to the jury, but there are strong reasons here for not doing so. If the special question of fact were submitted to the jury when objection is made, this would be cumbersome and raise awkward problems about unanimity. If the judge admits the evidence . . . to the jury and directs them to disregard it unless they find that the disputed fact exists, the aim of the exclusionary rule is likely to be frustrated, for two reasons. First, the jury will often not be able to erase the evidence from their minds, if they find that the conditioning fact does not exist. They could not if they would. Second, the average jury will not be interested in performing this intellectual gymnastic of “disregarding” the evidence. They are intent mainly on reaching their verdict in this case in accord with what they believe to be true, rather than in enforcing the long-term policies of evidence law.⁵⁰

United States Supreme Court Justice Samuel Chase opined in *United States v. Callender*⁵¹ that the common law was adopted by the federal Constitution in criminal cases and helped to define the rights, powers, and duties of a jury.⁵² Influential Chief Justice John Marshall similarly believed the common law of England became the common law of this country, and decisions made by English courts prior to

48. *Gorton v. Hadsell*, 63 Mass. 508, 511 (1852); see also SAMUEL PHILLIPPS, A TREATISE OF THE LAW OF EVIDENCE 13 (John Dunlap ed., New York, Gould, Banks & Gould 1816).

49. See Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 188 (1969).

50. CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 53, at 122-23 (1954); but see *Jackson v. Denno*, 378 U.S. 368, 435 (1964) (Harlan, J., dissenting) (opining that jurors are perfectly capable of resolving complex disputed factual issues regarding admissibility and disregarding an involuntary confession if properly instructed by a judge, because the same danger respecting a jury's ability to follow instructions to disregard particular evidence “arises whenever evidence admissible for one purpose is inadmissible for another, and the jury is admonished that it may consider the evidence only with respect to the former.”).

51. 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709).

52. *United States v. Callender*, 25 F. Cas. 239, 255-56 (C.C.D. Va. 1800) (No. 14,709).

the American Revolution were authoritative in the United States.⁵³ Professor James Bradley Thayer reviewed common law history and the development of the rules of evidence in his *Preliminary Treatise on Evidence* and concluded that “there is not, and never was, any such thing in jury trials as an allotting of all questions of fact to the jury. The jury simply decides some questions of fact.”⁵⁴ There is historical support from around the time of constitutional founding for Thayer’s view. William Hening explained in *The New Virginia Justice* that there were two types of exceptions to witness testimony: (1) those that went to the credit of a witness were left for a jury to decide and (2) those that went to competency over which “the court is the judge.”⁵⁵ In 1780, English Justice Francis Buller succinctly explained in *The Company of Carpenters v. Hayward*:⁵⁶ “Whether there be any evidence, is a question for the Judge. Whether sufficient evidence, is for the jury.”⁵⁷

Samuel Phillipps wrote in the first American edition of his *Treatise on the Law of Evidence* that “[a]s it is the province of the jury to consider what degree of credit ought to be given to evidence, so it is for the court alone to determine whether a witness is competent, or the evidence is admissible.”⁵⁸ Chief Justice Marshall opined in *United*

53. *Murdock v. Hunter*, 17 F. Cas. 1013, 1015 (C.C.D. Va. 1808) (No. 9941) (considering English common law evidentiary rules). This was the prevailing view of that time. See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 23 (New York, O. Halsted 1827) (“The revolution did not involve in it any abolition of the common law.”); but see 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 120 app. at 405-06 (Philadelphia, William Young Birch and Abraham Stall 1803) (asserting that the American revolution abrogated English common law except to the extent that it was actually brought into use during the existence of the colonial governments or was revived by constitutional or statutory provision).

54. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 185 (Boston, Little, Brown, and Company 1898).

55. WILLIAM HENING, THE NEW VIRGINIA JUSTICE 235-36, ¶ 82 (Richmond, Johnson & Warner 1810); see also 2 MATTHEW HALE, HISTORIA PLACITORUM CORONAE - THE HISTORY OF THE PLEAS OF THE CROWN 276-77 (London, E. and R. Nutt, and R. Gosling 1736) (explaining that jurors decided exceptions to the credit of a witness and courts decided exceptions as to competency).

56. (1780) 99 Eng. Rep. 241.

57. *Company of Carpenters v. Hayward* (1780) 99 Eng. Rep. 241, 242; 1 Douglas 374, 375; see also *Bartlett v. Smith*, (1843) 152 Eng. Rep. 895, 896-97, 11 Meeson & Welsby 483, 485-86 (later summarizing the orthodox view adopted in England).

58. SAMUEL PHILLIPPS, A TREATISE OF THE LAW OF EVIDENCE 13-14 (John Dunlap ed., New York, Gould, Banks & Gould 1816); see also FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 297 (New York, Southwick & Hardcastle 1806) (“If a particular fact go to the competency of a witness, it may be proved by other testimony [sic], as the copy of a record for perjury or felony. So of an interest in a witness in the event of a cause: and whether he be interested or not shall be decided by the judge.”); THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 87-88 n.b (Walpole, Thomas & Thomas 1804) (footnote b states, “A witness is properly said to be com-

*States v. Burr*⁵⁹ that judges decide admissibility questions as a matter of practical necessity:

No person will contend that, in a civil or criminal case, either party is at liberty to introduce what testimony he pleases, legal or illegal, and to consume the whole term in details of facts unconnected with the particular case. Some tribunal, then, must decide on the admissibility of testimony. The parties cannot constitute this tribunal; for they do not agree. The jury cannot constitute it; for the question is whether they shall hear the testimony or not. Who, then, but the court can constitute it? It is of necessity the peculiar province of the court to judge of the admissibility of testimony.⁶⁰

Early authorities recognized that judges may perform a fact-finding function when determining evidence admissibility. Phillips explained in his *Treatise on the Law of Evidence*:

[W]hatever antecedent facts are necessary to be ascertained, for the purpose of deciding the question of competency, as, for example, whether a child understands the nature of an oath - or, whether the confession of a prisoner was voluntary - or, whether declarations, offered in evidence as dying declarations, were made under the immediate apprehension of death: these, and other facts of the same kind, are to be determined by the court, and not by the jury.⁶¹

Thomas Starkie similarly wrote in his *Practical Treatise on the Law of Evidence* that:

It also belongs to the Court to decide all collateral matters arising in the course of the trial. Thus it is for the Court in all cases to determine upon the competency of witnesses, and the admissibility of particular evidence with reference to the facts in issue, or to the allegations on the record, even although the admissibility of the evidence should depend on a matter of fact.⁶²

petent, whenever he can be at all examined before a court of justice, and this *competency* is a question of *law* to be determined by the *judge*, previous to his giving evidence in the cause. If the law permits him to be examined, his *credibility* forms the most important part of the duty of a *jury*, which they must decide on, according to the opposing or corroborating circumstances of the case.”)

59. 25 F. Cas. 55 (C.C.D. Va. 1807) (No. 14,693).

60. *United States v. Burr*, 25 F. Cas. 55, 179 (C.C.D. Va. 1807) (No. 14,693).

61. SAMUEL PHILLIPPS, A TREATISE OF THE LAW OF EVIDENCE 13 (John Dunlap ed., New York, Gould, Banks & Gould 1816); see also ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE IN CIVIL AND CRIMINAL CASES AND A TREATISE ON BILLS OF EXCHANGE AND PROMISSORY NOTES 125 (Hartford, Oliver D. Cooke 1810) (“Whether the deceased was conscious of approaching death, or not, is a fact to be decided by the Court, in order to admit, or reject the evidence of his dying declarations, and is not a point to be left to the jury.”).

62. THOMAS STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE 429 (Theron Metcalf ed., Boston, Wells and Lilly 1826).

Professor John Henry Wigmore later described the principle that a judge must decide incidental questions of fact regarding admissibility as “one of the foundation-stones of our law”⁶³

The application of marital privilege in criminal conversation (*i.e.* adultery) and bigamy cases illustrates that judges were permitted to make factual determinations regarding admissibility that coincided with those to be later made by a jury regarding guilt. It has been a general rule for centuries that “the husband and wife cannot be witnesses for or against each other.”⁶⁴ In *State v. Phelps*,⁶⁵ a man was indicted “for being a married man, and as such being found in bed with a woman not his wife, under such circumstances as afforded a presumption of an illicit intention.”⁶⁶ The prosecution and defense argued whether or not a subsequently divorced wife could testify against her ex-husband when an alleged crime occurred while the marriage was still in effect.⁶⁷ The Chief Judge observed that “[h]e had investigated the subject, and was fully prepared to decide against the admissibility of the witness.”⁶⁸ The practice in bigamy cases was the same. Zephaniah Swift wrote in his *Digest of the Law of Evidence* that “[w]here the wife was prosecuted for bigamy, the husband was not allowed to give evidence of the first marriage.”⁶⁹ In these situations, both the crime and the testimonial disability depended upon the exist-

63. JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 3590-91 (Boston, Little, Brown, and Company 1905).

64. ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE IN CIVIL AND CRIMINAL CASES AND A TREATISE ON BILLS OF EXCHANGE AND PROMISSORY NOTES 92 (Hartford, Oliver D. Cooke 1810); *see also* THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 126 (Walpole, Thomas & Thomas 1804) (“the law, considering the policy of marriage, also prevents them from giving evidence against each other”); 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE - THE HISTORY OF THE PLEAS OF THE CROWN 301 (London, E. and R. Nutt, and R. Gosling 1736) (“A *feme covert* is not a lawful witness against her husband in case of treason”); 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER THEIR PROPER HEADS 431 (Savoy, Eliz. Nutt and R. Gosling 1721) (“It seems agreed That the Husband and Wife . . . shall not be admitted to give Evidence against the other”); EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND OR, A COMMENTARIE UPON LITTLETON, ch. 1, § 1, at 6b (London, Societie of Stationers 1628) (“a wife cannot be produced either against or for her husband”).

65. 2 Tyl. 374 (Vt. 1803).

66. *State v. Phelps*, 2 Tyl. 374, 374-75 (Vt. 1803).

67. *Phelps*, 2 Tyl. at 375-76.

68. *Id.* at 376.

69. ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE IN CIVIL AND CRIMINAL CASES AND A TREATISE ON BILLS OF EXCHANGE AND PROMISSORY NOTES 92 (Hartford, Oliver D. Cooke 1810); *see also* *Bassett v. United States*, 137 U.S. 496, 505-06 (1890) (recognizing the common law rule); *The King v. Cliviger* (1788) 100 Eng. Rep. 143, 146-47; 2 Term. Rep. 263, 267-69 (discussing testimonial incompetency of spouses in bigamy cases); 1 EDWARD EAST, A TREATISE OF PLEAS OF THE CROWN 469 (London, A. Strahan 1803) (“The first and true wife cannot be a witness against her husband, nor vice versa”); 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE - THE HISTORY OF THE PLEAS

tence of a marriage, and a court necessarily had to decide that fact when ruling upon admissibility.⁷⁰

History therefore substantiates the majority view. Justice Story wrote in his *Commentaries on the Constitution of the United States* that the constitutional right to a jury trial “does but follow out the established course of the common law in all trials for crimes.”⁷¹ Judges did not invade upon the province of a jury when making factual determinations pertaining to admissibility. The very nature of a jury trial requires a judge to rule on admissibility.⁷² Bigamy cases demonstrate that it did not matter if an antecedent fact necessary for an evidentiary ruling coincided with one that also had to be found by a jury with respect to guilt.⁷³ If antecedent facts needed to be determined, it was the responsibility of the judge, and not the jury, to decide them.⁷⁴

OF THE CROWN 693 (London, E. and R. Nutt, and R. Gosling 1736) (“The first and true wife is not to be allowed [sic] as a witness against the husband . . .”).

70. It was a felony to be “twice married . . .” 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND ch. 13, at 163 (Oxford, Clarendon Press 1769); *see also* 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER THEIR PROPER HEADS ch. 43, § 1, at 110 (Savoy, Eliz. Nutt and R. Gosling 1716) (stating that it was a felony “if any Person . . ., *being married*, do marry any Person of Persons, the former Husband or Wife being alive . . .”) (emphasis added). In such cases, a defendant’s first spouse could not testify if the first marriage was proven. *See* THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 128 (Walpole, Thomas & Thomas 1804) (explaining with respect to the testimonial disability that “on an indictment for bigamy, after a marriage in fact has been proved, a former wife is no witness to prove her marriage, because she is legally his wife, and therefore incompetent to give evidence against him.”).

71. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1785, at 662 (Boston, Hilliard, Gray, and Company 1833); *see also* Callan v. Wilson, 127 U.S. 540, 549-50 (1887) (quoting Story’s *Commentaries*); *see generally* U.S. CONST. art. III, § 2, cl. 3 (stating that “[t]he trial of all crimes, except in cases of impeachment, shall be by jury . . .”); U.S. CONST. amend. VI (stating that a criminal defendant “shall enjoy the right to a speedy and public trial, by an impartial jury . . .”).

72. *Burr*, 25 F. Cas. at 179.

73. Judges made coincidental preliminary determinations and applied marital privilege in bigamy cases since the 1600s. *See* Mary Griggs’s Case (1660) 83 Eng. Rep. 1; Raym. Sir. T. 1. Application in such cases was not limited to exclusion of evidence. Once it was determined that a first marriage was valid, a putative spouse from a subsequent marriage was allowed to testify since marital privilege did not technically attach to that invalid later marriage. *See* Miles v. United States, 103 U.S. 304, 315 (1880) (“When the first marriage is duly established by other evidence, to the satisfaction of the court, she may be admitted to prove the second marriage, but not the first . . .”); *see also* JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 594 (Philadelphia, Edward Earle 1819); WILLIAM HENING, THE NEW VIRGINIA JUSTICE 144, 240 (Richmond, Johnson & Warner 1810); THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 127-28 (Walpole, Thomas & Thomas 1804); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND ch. 13, at 164 (Oxford, Clarendon Press 1769); 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE - THE HISTORY OF THE PLEAS OF THE CROWN 693 (London, E. and R. Nutt, and R. Gosling 1736).

74. SAMUEL PHILLIPPS, A TREATISE OF THE LAW OF EVIDENCE 13 (John Dunlap ed., New York, Gould, Banks & Gould 1816); *see also* State v. Poll, 8 N.C. 237, 239 (1821)

III. UNITED STATES V. MAYHEW

John Mayhew was charged in the United States District Court for the Southern District of Ohio with, among other crimes, the kidnaping and murder of his daughter.⁷⁵ The prosecution sought to use a recorded statement given by Mayhew's daughter to a police officer shortly before she died, and Mayhew moved to exclude it.⁷⁶ The court recognized that the scenario presented an interesting problem with respect to forfeiture by wrongdoing: "[F]or the court to conclude that the accused committed the act rendering the declarant victim unavailable, the court must also conclude that the defendant committed the criminal act charged, because those two acts are the same."⁷⁷ United States District Court Judge Algenon Marbley noted that the problem seemed troublesome at first glance, but nonetheless held equitable considerations prevailed and the forfeiture doctrine could be applied "regardless of whether the defendant is standing trial for the identical crime that caused the declarant's unavailability."⁷⁸ He stated the following reasons for the court's decision: (1) confrontation forfeiture is an equitable doctrine that ensures a defendant will receive no benefit from his wrongdoing; (2) the jury will never learn the judge's preliminary finding, and the jury will use different information and a different standard of proof to decide the defendant's guilt; and (3) a judge is permitted in analogous evidentiary situations to determine preliminary facts that coincide with those to be later decided by the jury when reaching its verdict.⁷⁹

The forfeiture-by-wrongdoing doctrine is founded upon equitable principles.⁸⁰ Sir Geoffrey Gilbert wrote in his treatise on the *Law of Evidence* that the reason prior testimony could be used at common law against a defendant who was responsible for the unavailability of a witness was because such a wrongdoer "shall never be admitted to

(writing with respect to the admissibility of dying declarations that "[t]he latest and most authoritative cases show that the court is to decide, and not the jury, whether the deceased made the declaration under the apprehension of death."); Thomas John's Case (1790) reported in, 1 EDWARD EAST, A TREATISE OF THE PLEAS OF THE CROWN ch. 5, § 124, at 357, 358 (London, A. Strahan 1803) (stating the same).

75. See *United States v. Mayhew*, 380 F. Supp. 2d 961, 963 (S.D. Ohio 2005) (detailing the defendant's abduction and shooting of his daughter).

76. *Mayhew*, 380 F. Supp. 2d at 963.

77. *Id.* at 967 (quoting Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 522 (1997)).

78. *Id.* at 968.

79. *Id.*

80. See *id.* at 966-67, 968; see generally Tim Donaldson, *Combating Victim/Witness Intimidation in Family Violence Cases: A Response to Critics of the "Forfeiture by Wrongdoing" Confrontation Exception Resurrected by the Supreme Court in Crawford and Davis*, 44 IDAHO L. REV. 643, 647-65 (2008) (reviewing the origins and equitable reasons for the doctrine).

shelter himself by such evil Practices on the Witness, that being to give him Advantage of his own Wrong.”⁸¹ The United States Supreme Court similarly said in *Reynolds v. United States*⁸² when recognizing the doctrine for this country that “[t]he rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong”⁸³ The Supreme Court later confirmed in *Crawford v. Washington*⁸⁴ that “the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds”⁸⁵

The equitable principles upon which the forfeiture doctrine is based weigh against imposition of a subject matter limitation. Josephine Gray was indicted in *United States v. Gray*⁸⁶ for mail and wire fraud committed during her collection of life insurance benefits for husbands that she conspired to kill.⁸⁷ Gray and a boyfriend killed her second husband, in part, to keep him from testifying in an assault case.⁸⁸ The United States Court of Appeals for the Fourth Circuit rejected Gray’s argument that the forfeiture-by-wrongdoing rule “should not apply in this case because she did not intend to procure Robert Gray’s unavailability as a witness at *this* trial.”⁸⁹ The court recognized that the forfeiture rule had been adopted with the “specific goal to implement a ‘prophylactic rule to deal with abhorrent behavior which strikes at the heart of the system of justice itself.’”⁹⁰ The court explained that the exception prevents wrongdoers from profiting by silencing witnesses, and it should be broadly construed to ensure that a defendant cannot avoid the evidentiary impact of statements made

81. GEOFFREY GILBERT, THE LAW OF EVIDENCE 141 (London, Henry Lintot 1756). This anonymously published treatise is attributed to Lord Chief Baron Gilbert of the Exchequer, see 1 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 8, at 26 (Boston, Little, Brown, and Company 1904).

82. 98 U.S. 145 (1878).

83. *Reynolds v. United States*, 98 U.S. 145, 159 (1878).

84. 541 U.S. 36 (2004).

85. *Crawford v. Washington*, 541 U.S. 36, 62 (2004); see also *Davis v. Washington*, 547 U.S. 813, 833 (2006) (reiterating what the Court said in *Crawford* and further explaining that “[w]hile 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.”).

86. 405 F.3d 227 (4th Cir. 2005).

87. *United States v. Gray*, 405 F.3d 227, 230-33 (4th Cir. 2005).

88. See *Gray*, 405 F.3d at 231-32 (describing the murder of Gray’s ex-husband a week before he was scheduled to testify against her for earlier assaulting him with a knife and club).

89. *Id.* at 241.

90. *Id.* (quoting FED. R. EVID. 804 advisory committee’s note to 1997 amendment); see also *United States v. Mastrangelo*, 693 F.2d 269, 272-73 (2d Cir. 1982); *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982).

by the defendant's victim.⁹¹ The court therefore refused to limit application of the doctrine, holding that it "applies *whenever* the defendant's wrongdoing was intended to, and did, render the declarant unavailable as a witness against the defendant, without regard to the nature of the charges at the trial in which the declarant's statements are offered."⁹²

The forfeiture doctrine can only be effective as a prophylactic measure if it does not have loopholes. It would not make sense that a defendant might forfeit the right to confront a witness at his or her trial for a drug crime by murdering the witness, but not at the trial for the murder itself.⁹³ The United States Court of Appeals for the District of Columbia Circuit explained in *United States v. White*:⁹⁴

It is hard to imagine a form of misconduct more extreme than the murder of a potential witness. Simple equity supports a forfeiture principle, as does a common sense attention to the need for fit incentives. The defendant who has removed an adverse witness is in a weak position to complain about losing the chance to cross-examine him. And where a defendant has silenced a witness through the use of threats, violence or murder, admission of the victim's prior statements at least partially offsets the perpetrator's rewards for his misconduct. We have no hesitation in finding, in league with all circuits to have considered the matter, that a defendant who wrongfully procures the absence of a witness or potential witness may not assert confrontation rights as to that witness.⁹⁵

In short, "[t]he equitable rationale of the forfeiture doctrine is no less compelling when the issue is whether to admit hearsay statements of the person whom the defendant is accused of having murdered to prevent his testimony"⁹⁶

It is also true that "the jury will use different information and a different standard of proof to decide the defendant's guilt" when a judge makes a preliminary finding for purposes of confrontation forfei-

91. *Gray*, 405 F.3d at 242.

92. *Id.* at 241; *see also* *United States v. Johnson*, 495 F.3d 951, 972 (8th Cir. 2007); *United States v. Dhinsa*, 243 F.3d 635, 652-53 (2d Cir. 2001); *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999); *United States v. Miller*, 116 F.3d 641, 667-68 (2d Cir. 1997); *but see* *State v. Jarzbek*, 529 A.2d 1245, 1253 (Conn. 1987) (opining that the constitutional right of confrontation would have little force if it is impliedly waived by conduct that occurred during the commission of the crime for which a defendant is on trial).

93. *But see* *State v. Moua Her*, 750 N.W.2d 258, 297-98 (Minn. 2008) (Page, J., concurring) (opining that the logical extension of "equitable" forfeiture could be taken too far in murder cases).

94. 116 F.3d 903 (D.C. Cir. 1997).

95. *United States v. White*, 116 F.3d 903, 911 (D.C. Cir. 1997).

96. *Jenkins v. United States*, 80 A.3d 978, 997 (D.C. 2013).

ture that coincides with a factual issue to be decided by a jury.⁹⁷ The Supreme Court has not taken a position on the standards necessary to prove confrontation forfeiture.⁹⁸ The Supreme Court has, however, codified the doctrine in Evidence Rule 804(b)(6).⁹⁹ For purposes of admissibility determinations, that rule adopts the “usual Rule 104(a) preponderance of the evidence standard”¹⁰⁰ By contrast, a jury will decide factual questions regarding guilt on a reasonable doubt standard.¹⁰¹ Evidence Rule 104 additionally permits a judge to rely on proof when making an admissibility ruling that may not be heard by a jury.¹⁰² The Supreme Court recognized in *Davis v. Washington*¹⁰³ that state courts have allowed consideration of “hearsay evidence, including the unavailable witness’s out-of-court statements”¹⁰⁴ A jury should not be prejudiced by factual determinations properly made by a judge when ruling on admissibility, because it “will never learn of the judge’s preliminary finding.”¹⁰⁵

Many courts have seen similarities between the operation of the forfeiture-by-wrongdoing doctrine and the co-conspirator statement rule.¹⁰⁶ The D.C. Circuit recognized in *United States v. White*¹⁰⁷ that

97. *Mayhew*, 380 F. Supp. 2d at 968.

98. *Davis*, 547 U.S. at 833.

99. *Id.*; see also FED. R. EVID. 804(b)(6). The Supreme Court has commented that the rule codifies the forfeiture-by-wrongdoing doctrine. *Davis*, 547 U.S. at 833; see also *Giles v. California*, 554 U.S. 353, 367 (2008).

100. H.R. Doc. No. 105-69 (1997) (Order Amending Federal Rules of Evidence at 23 (Apr. 11, 1997)). The Supreme Court acknowledged in *Davis* that lower federal courts applying FED. R. EVID. 804(b)(6) “have generally held the Government to the preponderance-of-evidence standard” *Davis*, 547 U.S. at 833. Other courts have additionally rejected arguments that a reasonable doubt standard should apply and have adopted either a preponderance or clear-and-convincing evidence standard for making forfeiture determinations. See generally Tim Donaldson, *Keeping the Balance True: Proof Requirements for Confrontation Forfeiture by Wrongdoing*, 31 T.M. COOLEY L. REV. 429, 432-42 (2014) (reviewing the proof standards adopted by lower courts).

101. *In re Winship*, 397 U.S. 358, 364 (1969). See *United States v. Thevis*, 665 F.2d 616, 630-31 (5th Cir. 1982) (explaining the difference between the proof standards needed for evidentiary rulings and convictions).

102. *Mayhew*, 380 F. Supp. 2d at 968 n.9; see also FED. R. EVID. 104(a); FED. R. EVID. 1101(d)(1).

103. 547 U.S. 813 (2006).

104. *Davis*, 547 U.S. at 833 (quoting *Commonwealth v. Edwards*, 830 N.E.2d 158, 174 (Mass. 2005)).

105. *Mayhew*, 380 F. Supp. 2d at 968; see also *Moua Her*, 750 N.W.2d at 274, vacated, 555 U.S. 1092 (2009); *People v. Giles*, 152 P.3d 433, 445 (Cal. 2007) (quoting *Mayhew*), vacated on other grounds by *Giles*, 554 U.S. at 355-73, 376-77; see generally Tim Donaldson, *A Reliable and Clear-Cut Determination: Is a Separate Hearing Required to Decide when Confrontation Forfeiture by Wrongdoing Applies?* 49 NEW ENG. L. REV. 167, 183-184, 200 (2015) (reviewing and recommending adoption of precautions taken in analogous situations regarding admission of co-conspirator statements).

106. See e.g., *Giles*, 554 U.S. at 403 (Breyer, J., dissenting); *Mayhew*, 380 F. Supp. 2d at 968; *Giles*, 152 P.3d at 445, vacated on other grounds by *Giles*, 554 U.S. at 355-73, 376-77; *Jenkins*, 80 A.3d at 997-98; *Gonzalez v. State*, 195 S.W.3d 114, 125 n.47 (Tex. Crim. App. 2006).

a “forfeiture finding is the functional equivalent of the predicate factual finding that a court must make before admitting hearsay under the co-conspirator exception.”¹⁰⁸ The United States Court of Appeals for the Eighth Circuit has also noted the “functional similarity of the questions involved.”¹⁰⁹ The United States Court of Appeals for the First Circuit wrote in *United States v. Houlihan*¹¹⁰ that “[p]roving the conditions precedent to the applicability of the coconspirator exception is analytically and functionally identical to proving that a defendant’s wrongdoing waives his rights under the Confrontation Clause.”¹¹¹ Cases regarding the operation of the co-conspirator statement rule are therefore instructive. The preliminary question regarding the applicability of the co-conspirator hearsay exception coincides with the ultimate question of fact for the jury when a conspiracy is charged.¹¹² “Nevertheless, the fact-finding responsibilities of the judge and jury are distinct.”¹¹³ The United States Court of Appeals for the Sixth Circuit explained in *United States v. Enright*¹¹⁴ that “the trial judge is ruling on the admissibility of evidence, not guilt or innocence”¹¹⁵

The weight of authority therefore supports the conclusion reached by Judge Marbley in *United States v. Mayhew*¹¹⁶ that:

In sum, the equitable principles outlined in *Crawford*, the jury’s ignorance of the court’s threshold evidentiary determination, and the analogous evidentiary paradigm of conspiracy permit this Court to make a preliminary finding as to whether the Defendant’s wrongdoing resulted in the unavailability of the declarant . . . even though he is on trial for her murder.¹¹⁷

107. 116 F.3d 903 (D.C. Cir. 1997).

108. *White*, 116 F.3d at 912; *see also* *State v. Jensen*, 727 N.W.2d 518, 535-36 (Wis. 2007) (quoting *Mayhew*), *abrogated in part by* *Giles*, 554 U.S. at 359-68; *Commonwealth v. Edwards*, 830 N.E.2d 158, 173 (Mass. 2005); *cf.* *United States v. Baskerville*, 448 F. App’x 243, 249-50 (3d Cir. 2011) (finding no convincing reason to use different procedures when applying the co-conspirator statement rule and the forfeiture-by-wrongdoing doctrine).

109. *Emery*, 186 F.3d at 926.

110. 92 F.3d 1271 (1st Cir. 1996).

111. *United States v. Houlihan*, 92 F.3d 1271, 1280 (1st Cir. 1996); *see also* *Steele v. Taylor*, 684 F.2d 1193, 1203 (6th Cir. 1982).

112. *United States v. Enright*, 579 F.2d 980, 985 (6th Cir. 1978).

113. *Enright*, 579 F.2d at 985.

114. 579 F.2d 980 (6th Cir. 1978).

115. *Enright*, 579 F.2d at 985.

116. 380 F. Supp. 2d 961 (S.D. Ohio 2005).

117. *Mayhew*, 380 F. Supp. 2d at 968. It should, however, be noted that Judge Marbley’s decision in *Mayhew* also concluded the motives behind a defendant’s misconduct were irrelevant to operation of the forfeiture-by-wrongdoing doctrine. *Id.* at 966-67. That conclusion has been abrogated by the adoption of a purpose requirement. *Giles*, 554 U.S. at 359-68.

IV. MINORITY CONCERNS REGARDING COINCIDENTAL FACTUAL DETERMINATIONS

Reflexive forfeiture has been rejected by judges who believe that it infringes upon a criminal defendant's trial rights. Washington State Supreme Court Justice Sanders opined that it "invades the province of the jury by forcing the judge to determine . . . guilt prior to . . . trial."¹¹⁸ Other jurists have expressed additional concern that reflexive forfeiture determinations offend the presumption of innocence.¹¹⁹ United States District Court Judge Ronald Guzmán more fully explained in *United States v. Mikos*:¹²⁰

The relaxation of the rules of evidence based upon the Court's pretrial determination of the defendant's probable guilt carries with it the very real possibility of someday substantially eroding the defendant's right to be presumed innocent. The rules of trial should not depend upon the Court's pretrial opinion of the defendant's guilt or innocence. This issue is not necessarily encountered when the wrongful conduct which the defendant is accused of in connection with the witness' unavailability is not also the very crime for which he will be tried. But when it is the case, the Court should, at the very least, be extremely reticent to engage in any pretrial procedures that might predetermine the outcome of the case. By relaxing the rules of evidence to allow testimony which would not be admissible absent a pretrial determination of guilt, we come perilously close to a self-fulfilling prophecy.¹²¹

Washington State Supreme Court Justice Wiggins referred to the potential self-fulfilling prophecy of reflexive forfeiture as a "circular trap."¹²²

In layman's terms, the legal arguments express a common sense objection that reflexive forfeiture operates backwardly. From the standpoint of someone wrongly accused that a tumultuous relationship culminated in murder, there were undoubtedly many ugly things said, and maybe even formal allegations made, during its course. They are exactly the type of statements, when repeated, that made the

118. *State v. Mason*, 162 P.3d 396, 412 (Wash. 2007) (Sanders, J., dissenting); see also *United States v. Lentz*, 282 F. Supp. 2d 399, 426 (E.D. Va. 2002) (referring to reflexive forfeiture as a preliminary conviction), *aff'd on other grounds*, 58 F. App'x 961 (4th Cir. 2003).

119. *Lentz*, 282 F. Supp. 2d at 426; *Mason*, 162 P.3d at 410 (Alexander, C.J., concurring).

120. No. 02-CR-137-1, 2004 WL 1631675 (N.D. Ill. Jul. 16, 2004).

121. *United States v. Mikos*, No. 02-CR-137-1, 2004 WL 1631675, at *5 (N.D. Ill. Jul. 16, 2004).

122. *State v. Dobbs*, 320 P.3d 705, 714 (Wash. 2014) (Wiggins, J., dissenting); see also *Giles v. California*, 554 U.S. 353, 379 (2008) (Souter, J., concurring) (expressing concerns about "circularity").

accused person a suspect. For that person, especially if unfamiliar with the legal process, reflexive forfeiture seems counterintuitive. The innocent person accused of forfeiture-by-wrongdoing may legitimately wonder how he or she can be adjudged to have committed charged misconduct before the conclusion of a trial and why someone other than a jury can make that determination.

The California Supreme Court recognized in *People v. Giles*¹²³ that “[t]he argument against permitting a judicial preliminary determination of forfeiture is that in ruling on the evidentiary matter, a trial court is required, in essence, to make the same determination of guilt of the charged crime as the jury.”¹²⁴ However, that court concluded that “[t]he presumption of innocence and right to jury trial will not be infringed because the jury ‘will never learn of the judge’s preliminary finding’ and ‘will use different information and a different standard of proof to decide the defendant’s guilt.’”¹²⁵ The California Supreme Court noted that the accepted procedures for admitting co-conspirator statements were analogous, because a trial court in that situation also makes a preliminary finding regarding the fact of a conspiracy even when the underlying crime depends upon the existence of the same conspiracy.¹²⁶

The Texas Court of Criminal Appeals in *Gonzalez v. State*¹²⁷ similarly rejected an argument that a “trial court cannot make a preliminary finding of fact, under Rule 104(a), that the defendant committed the very act of murder for which he is on trial in determining the applicability of the doctrine of forfeiture by wrongdoing.”¹²⁸ It noted that several pre- and post-*Crawford* cases have cited Evidence Rule 104(a) as the proper mechanism to use when making such determinations.¹²⁹ The court further explained that “[s]imilar preliminary rulings on an ultimate issue are frequently made in conspiracy cases when a trial judge determines whether certain statements are admissible as a co-conspirator statement.”¹³⁰

123. 152 P.3d 433 (Cal. 2007).

124. *People v. Giles*, 152 P.3d 433, 445 (Cal. 2007), *vacated on other grounds by Giles*, 554 U.S. at 355-73, 376-77; *see generally Lentz*, 282 F. Supp. 2d at 426 (opining that reflexive forfeiture deprives a criminal defendant of the right to have a jury decide the issue), *aff’d on other grounds*, 58 F. App’x at 961; *State v. Mason*, 162 P.3d at 412 (Sanders, J., dissenting) (stating the same).

125. *Giles*, 152 P.3d at 445 (quoting *United States v. Mayhew*, 380 F. Supp. 2d 961, 968 (S.D. Ohio 2005)), *vacated on other grounds by Giles*, 554 U.S. at 355-73, 376-77.

126. *Giles*, 152 P.3d at 445, *vacated on other grounds by Giles*, 554 U.S. at 355-73, 376-77; *see also Mayhew*, 380 F. Supp. 2d at 968.

127. 195 S.W.3d 114 (Tex. Crim. App. 2006).

128. *Gonzalez v. State*, 195 S.W.3d 114, 125 n.47 (Tex. Crim. App. 2006).

129. *Gonzalez*, 195 S.W.3d at 125 n.47.

130. *Id.*

Application of the forfeiture doctrine in a murder case where a missing witness is also the victim is analogous to the application of the co-conspirator statement rule in a conspiracy case. A judge must inquire into guilt when making a forfeiture determination in a case where a defendant is charged with murdering a witness.¹³¹ Similarly, “where a defendant is charged with conspiracy, the judge is permitted to make an initial finding that the conspiracy existed so as to determine whether a statement can be admitted under the co-conspirator exception to the hearsay rule.”¹³² The United States Supreme Court held in *Bourjaily v. United States*¹³³ that a trial judge need only be persuaded by a preponderance of evidence that the requirements of the co-conspirator statement rule have been met.¹³⁴ The Court further ruled that a trial court “may examine the hearsay statements sought to be admitted” when making admissibility determinations under that rule.¹³⁵ The Court did not directly address the propriety of a trial court making an evidentiary ruling that coincides with the ultimate issue in a case, but it expressed no apparent concern when commenting that “[c]ourts often act as factfinders”¹³⁶

There was no clean separation at common law between the roles of judges and juries with respect to fact questions.¹³⁷ The modern jury trial, by which questions of fact are decided on the basis of evidence produced in court, did not fully emerge until the end of the 1600s and the beginning of the 1700s.¹³⁸ The regulation of trial evidence before that time was unlike it is today. The hearsay rule did not become fixed until sometime between 1675 and 1690.¹³⁹ Hearsay was regularly allowed as evidence until the middle of the 1600s even over objection.¹⁴⁰ In addition, jurors were allowed until the 1700s to decide cases on the basis of private facts known to the jurors that were not presented in court.¹⁴¹

131. *Giles*, 554 U.S. at 374 n.6 (plurality opinion).

132. *Id.* at 403 (2008) (Breyer, J., dissenting) (citing *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987)).

133. 483 U.S. 171 (1987).

134. *Bourjaily*, 483 U.S. at 175-76.

135. *Id.* at 181.

136. *Id.* at 180.

137. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 185 (Boston, Little, Brown, and Company 1898).

138. See generally Tim Donaldson, *Gradually Exploded: Confrontation vs. the Former Testimony Rule*, 46 ST. MARY'S L.J. 137, 149-51, 175-78 (2015) (tracing the origins and development of the modern jury trial).

139. John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 445 (1904).

140. *Id.* at 444.

141. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND ch. 23, at 368, 374-75 (Oxford, Clarendon Press 1768).

It became the role of a judge in the modern jury trial to regulate the introduction of evidence and decide admissibility questions regarding disputed facts. Matthew Hale described the modern trial process in his *History and Analysis of the Common Law* by which evidence is presented in open court “before the Judge and Jury, where each Party has Liberty of excepting, either to the Competency of the Evidence, or the Competency or Credit of the Witnesses, which Exceptions are publickly [sic] stated, and by the Judges openly and publickly [sic] allowed or disallowed”¹⁴² A judge did not, however, impermissibly invade upon the province of a jury when delving further into factual matters. Hale also explained that judges and jurors shared functions with regards to fact questions:

Another Excellency of this Trial is this, That the Judge is always present at the Time of the Evidence given in it: Herein he is able in Matters of Law emerging upon the Evidence to direct them; and also, in Matters of Fact, to give them a great Light and Assistance by his weighing the Evidence before them, and observing where the Question and Knot of the Business lies, and by shewing [sic] them his Opinion even in Matter of Fact, which is a great Advantage and Light to Lay-Men. And thus, as the Jury assists the Judge in determining the Matter of Fact, so the Judge assists the Jury in determining Points of Law, and also very much in investigating and enlightning [sic] the Matter of Fact, where of the Jury are Judges.¹⁴³

The operation of the co-conspirator statement rule demonstrates that judges and jurors could both have dominion over the same fact issue at different stages of a proceeding. The Supreme Court described the rule in *United States v. Gooding*¹⁴⁴ that “in cases of conspiracy and riot, when once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all.”¹⁴⁵ The admissibility of an act committed by an alleged conspirator was therefore dependent upon establishment of a conspiracy.¹⁴⁶ The Connecticut Supreme Court explained in *Gardner v. Preston*¹⁴⁷ that this

142. MATTHEW HALE, *THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND* 256-57 (Savoy, J. Nutt 1713).

143. *Id.* at 259-60.

144. 25 U.S. 460 (1827).

145. *United States v. Gooding*, 25 U.S. 460, 469 (1827); *see also* *Case of Fries*, 9 F. Cas. 924, 931-32 (C.C.D. Pa. 1800) (No. 5,127) (explanation of the rule by Supreme Court Associate Justice Samuel Chase).

146. 1 EDWARD EAST, *A TREATISE OF PLEAS OF THE CROWN* 97 (London, A. Strahan 1803) (explaining that a judge must decide whether a sufficient connection between alleged co-conspirators has been made before admission of any consequential evidence).

147. 2 Day 205 (Conn. 1805).

entailed preliminary resolution by a judge of a factual question that would ultimately be decided by a jury: “[i]t is for the Court to decide, Whether the evidence conduced *at all* to the proof of the fact, which was to be ascertained. But this point having been determined, the question *how far* it conduced to prove the fact, is exclusively within the cognizance of the jury.”¹⁴⁸

Connecticut Supreme Court Justice Swift further explained in his *Digest of the Law of Evidence*:

[W]hen the connection between the parties, is established by evidence; of which the Court must, in the first instance judge, previous to the admission of any consequential evidence to affect the prisoner by the acts of others, to which he was not a party or privy, then whatever is done in pursuance of that conspiracy by one of the conspirators, though unknown, perhaps, to the rest, at the time, is to be considered as the act of all.¹⁴⁹

A judge was therefore required to make a preliminary factual determination that coincided with the ultimate issue in conspiracy cases when ruling on the admissibility of purported co-conspirator statements.

Modern cases have considered in the context of the co-conspirator statement rule whether a judge invades upon the province of a jury when making a coincidental preliminary fact determination for purposes of evidence admissibility. The United States Court of Appeals for the Ninth Circuit acknowledged in *Carbo v. United States*¹⁵⁰ with respect to the admissibility of co-conspirator statements:

The situation is rendered confusing by the fact that the admissibility of this evidence (concededly relevant but challenged under a technical evidentiary rule of competence) depends upon a disputed preliminary question of fact which coincides with the ultimate jury question upon the merits. The declarations are admissible against the defendants if they are co-conspirators. If they are co-conspirators they are guilty. The problem presented to us is whether the preliminary question (upon the resolution of which only independent evidence is available) is to be resolved by the jury or by the judge. Appellants’ view of the law, as set forth in the proposed instructions, is that the preliminary question is to be resolved by the jury upon proof beyond a reasonable doubt.¹⁵¹

148. Gardner v. Preston, 2 Day 205, 208 (Conn. 1805).

149. ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE IN CIVIL AND CRIMINAL CASES AND A TREATISE ON BILLS OF EXCHANGE AND PROMISSORY NOTES 156 (Hartford, Oliver D. Cooke 1810).

150. 314 F.2d 718 (9th Cir. 1963).

151. Carbo v. United States, 314 F.2d 718, 736 (9th Cir. 1963).

The Ninth Circuit in *Carbo* nonetheless rejected an argument that the trial court should have instructed the jury to disregard the evidence unless it first found the defendant guilty.¹⁵² The court instead accepted the problem as one regarding the admissibility of evidence and adopted the “orthodox prevailing view of the allocation of functions between judge and jury, which assigns to the judge decisions upon preliminary questions of fact determinative of the admissibility of evidence challenged under technical evidentiary rules.”¹⁵³ The Ninth Circuit explained that admissibility “is not a substantive question as to the qualitative sufficiency of the evidence necessary to prove the existence of a conspiracy.”¹⁵⁴ The court in *Carbo* reasoned that the co-conspirator statement rule would serve no logical purpose if a jury first had to find a defendant guilty of conspiracy based on other evidence before a co-conspirator statement could be considered.¹⁵⁵ The United States Court of Appeals for the Fifth Circuit relied upon *Carbo* in *United States v. James*,¹⁵⁶ and commented that “[n]othing in the procedure which we announce here deprives a defendant of a trial by jury. The judge is ruling solely on admissibility of evidence.”¹⁵⁷

The United State Court of Appeals for the District of Columbia Circuit considered and rejected arguments in *Jenkins v. United States*¹⁵⁸ that reflexive forfeiture violates due process by undermining the presumption of innocence and a judge’s objectivity in a case.¹⁵⁹ The court looked to conspiracy cases, and concluded that reflexive forfeiture:

does not threaten the integrity of the trial. Judges often make preliminary determinations that involve an assessment

152. *Carbo*, 314 F.2d at 736; see also *United States v. King*, 552 F.2d 833, 846-49 (9th Cir. 1976) (reaffirming *Carbo*).

153. *Carbo*, 314 U.S. at 737; cf. *United States v. Dennis*, 183 F.2d 201, 231 (2d Cir. 1950) (Hand, J.) (commenting that “the better doctrine is that the judge is always to decide, as concededly he generally must, any issues of fact on which the competence of evidence depends . . .”), *aff’d on other grounds*, 341 U.S. 494 (1951).

154. *Carbo*, 314 U.S. at 736.

155. *Id.* at 735-36.

156. 576 F.2d 1121 (5th Cir. 1978).

157. *United States v. James*, 576 F.2d 1121, 1132 (5th Cir. 1978), *modified en banc*, 590 F.2d 575, 577-80 (5th Cir. 1979); see also *United States v. Enright*, 579 F.2d 980, 985-86 (6th Cir. 1978); *United States v. Mitchell*, 556 F.2d 371, 377 (6th Cir. 1977); *United States v. Jones*, 542 F.2d 186, 203 n.33 (4th Cir. 1976); *United States v. Rosenstein*, 474 F.2d 705, 712-13 (2d Cir. 1973); *United States v. Pisciotto*, 469 F.2d 329, 332-33 (10th Cir. 1972); *United States v. Bey*, 437 F.2d 188, 191-92 (3d Cir. 1971); *United States v. Ragland*, 375 F.2d 471, 478-79 (2d Cir. 1967); *United States v. Pasha*, 332 F.2d 193, 198 (7th Cir. 1964); cf. *United States v. Bell*, 573 F.2d 1040, 1043 (8th Cir. 1978) (basing its holding on FED. R. EVID. 104); *United States v. Petrozziello*, 548 F.2d 20, 22-23 (1st Cir. 1977) (same), *abrogated on other grounds by United States v. Goldberg*, 105 F.3d 770, 775-76 (1st Cir. 1997).

158. 80 A.3d 978 (D.C. 2013).

159. *Jenkins v. United States*, 80 A.3d 978, 997 (D.C. 2013).

of the strength of the case against the defendant before the ultimate issue is decided. They do so, for example, in ruling on the admissibility of coconspirator hearsay in conspiracy cases and when deciding whether to release a defendant prior to trial. These determinations neither prevent the judge from presiding impartially over the case nor shift the burden of proof to the defense; the prosecution retains the burden of proving the defendant's guilt beyond a reasonable doubt.¹⁶⁰

Circuit court decisions regarding the operation of the co-conspirator statement rule are consistent with Supreme Court cases involving the interaction between evidentiary rulings and trial rights. The Court commented in a footnote in *United States v. Nixon*¹⁶¹ that the determination whether there is proof of a conspiracy sufficient to invoke the co-conspirator statement rule "is a question of admissibility of evidence to be decided by the trial judge."¹⁶² In *Bourjaily v. United States*,¹⁶³ the Supreme Court explained that a judge does not violate a defendant's right to have guilt proven beyond a reasonable doubt when making an admissibility determination, because:

Evidence is placed before the jury when it satisfies the technical requirements of the evidentiary Rules, which embody certain legal and policy determinations. The inquiry made by a court concerned with these matters is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied. Thus, the evidentiary standard is unrelated to the burden of proof on the substantive issues, be it a criminal case . . . or a civil case.¹⁶⁴

In *Lego v. Twomey*,¹⁶⁵ the Court rejected an argument that a defendant is entitled to have a jury make factual determinations when constitutional rights are at issue, writing:

Duncan v. Louisiana, 391 U.S. 145 (1968), which made the Sixth Amendment right to trial by jury applicable to the States, did not purport to change the normal rule that the admissibility of evidence is a question for the court rather than the jury. Nor did that decision require that both judge and jury pass upon the admissibility of evidence when constitutional grounds are asserted for excluding it.¹⁶⁶

160. *Jenkins*, 80 A.3d at 997-98.

161. 418 U.S. 683 (1974).

162. *United States v. Nixon*, 418 U.S. 683, 701 n.14 (1974).

163. 483 U.S. 171 (1987).

164. *Bourjaily*, 483 U.S. at 175.

165. 404 U.S. 477 (1972).

166. *Lego v. Twomey*, 404 U.S. 477, 490 (1972).

In combination, these Supreme Court cases recognize that judges decide admissibility questions even when constitutional rights are implicated,¹⁶⁷ those admissibility questions can involve issues of ultimate fact,¹⁶⁸ and the preliminary resolution of such issues does not violate a criminal defendant's right to have guilt proven beyond a reasonable doubt.¹⁶⁹

The presumption of innocence and the reasonable doubt standard are due process safeguards.¹⁷⁰ "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice."¹⁷¹ Justice Story opined in his *Commentaries on the Constitution of the United States* that due process "in effect affirms the right of trial according to the process and proceedings of the common law."¹⁷² Supreme Court cases have subsequently established that it is a more flexible and evolving principle,¹⁷³ but "traditional practice provides a touchstone for constitutional analysis."¹⁷⁴ The co-conspirator statement rule has withstood constitutional challenge from the same arguments made against reflexive application of the forfeiture doctrine.¹⁷⁵ It has long been an uninterrupted and accepted practice in conspiracy cases for judges to make preliminary assessments regarding the strength of a case against a defendant for admissibility purposes before a jury decides guilt.¹⁷⁶ This has not, however, been found to violate a defendant's right to a jury trial or presumption of innocence, because a judge is ruling only upon the admissibility of evidence.¹⁷⁷ The burden of proof is not shifted, and a defendant must still be proven guilty beyond a reasona-

167. *Twomey*, 404 U.S. at 490.

168. *See Nixon*, 418 U.S. at 701 n.14.

169. *Bourjaily*, 483 U.S. at 175.

170. *Estelle v. Williams*, 425 U.S. 501, 517 (1976) (presumption of innocence); *In re Winship*, 397 U.S. 358, 364 (1969) (reasonable doubt standard).

171. *Lisenba v. California*, 314 U.S. 219, 236 (1941).

172. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1783, at 661 (Boston, Hilliard, Gray and Company 1833).

173. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643, 650-60 (1961); *see generally* Tim Donaldson, *Kangaroo Proof: Due Process vs. Hearsay*, 43 S.U. L. REV. 175, 181-91 (2016) (tracing the development of Supreme Court due process cases).

174. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994).

175. *Compare Carbo*, 314 F.2d at 736-37 (rejecting arguments that a co-conspirator statement cannot be considered unless jury finds beyond a reasonable doubt that a conspiracy existed), *with Lentz*, 282 F. Supp. 2d at 426 (asserting that reflexive forfeiture deprives a defendant of the presumption of innocence and the right to have guilt decided by a jury), *aff'd on other grounds*, 58 F. App'x at 961.

176. *See Jenkins*, 80 A.3d at 997-98; ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE IN CIVIL AND CRIMINAL CASES AND A TREATISE ON BILLS OF EXCHANGE AND PROMISSORY NOTES 156 (Hartford, Oliver D. Cooke 1810).

177. *See e.g.*, *United States v. James*, 576 F.2d 1121, 1132 (5th Cir. 1978), *modified en banc*, 590 F.2d 575, 577-80 (5th Cir. 1979).

ble doubt.¹⁷⁸ Fundamental fairness should not demand more when forfeiture is at issue than what traditional practice already allows in conspiracy cases with respect to coincidental fact determinations.¹⁷⁹

V. GILES V. CALIFORNIA

*Giles v. California*¹⁸⁰ involved reflexive forfeiture.¹⁸¹ During Giles's trial for murdering a former girlfriend, the trial court allowed a police officer to testify about what the victim had told him when responding to an earlier domestic violence call.¹⁸² The California Supreme Court saw no reason why the forfeiture doctrine could not be applied in cases where the alleged wrongdoing is the same as the offense for which a defendant is on trial.¹⁸³ The United States Supreme Court's decision in *Giles* dealt primarily with whether the forfeiture doctrine contained a purpose requirement.¹⁸⁴ The Court recognized that "the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable."¹⁸⁵ The United States Supreme Court therefore vacated the judgment of the California Supreme Court in *Giles*.¹⁸⁶ A purpose requirement is not, however, incompatible with reflexive confrontation forfeiture.¹⁸⁷

Reflexive forfeiture was mentioned as a justification for the majority's adoption of a purpose requirement in *Giles v. California*.¹⁸⁸ Justice Scalia wrote on behalf of himself, Chief Justice Roberts, Justices Thomas, and Justice Alito that the purpose requirement adopted by the majority kept the forfeiture doctrine from running afoul of a principle repugnant to our jury trial system: deprivation of fair-trial rights simply because a judge considers a defendant guilty.¹⁸⁹ The

178. *Jenkins*, 80 A.3d at 998.

179. *See Giles*, 152 P.3d at 445 ("We see no reason to adopt a different rule."), *vacated on other grounds by Giles*, 554 U.S. at 355-73, 376-77.

180. 554 U.S. 353 (2008).

181. *See People v. Giles*, 152 P.3d 433, 444-45 (Cal. 2007), *vacated on other grounds by Giles v. California*, 554 U.S. 353, 355-73, 376-77 (2008).

182. *Giles*, 554 U.S. at 356-57.

183. *Giles*, 152 P.3d at 445, *vacated on other grounds by Giles*, 554 U.S. at 355-73, 376-77.

184. *See Giles*, 554 U.S. at 359-68.

185. *Id.* at 367.

186. *Id.* at 377.

187. *See* Tim Donaldson, *Combating Victim/Witness Intimidation in Family Violence Cases: A Response to Critics of the "Forfeiture by Wrongdoing" Confrontation Exception Resurrected by the Supreme Court in Crawford and Davis*, 44 IDAHO L. REV. 643, 674 (2008) (discussing authorities where reflexive forfeiture co-existed with a purpose requirement adopted by FED. R. EVID. 804(b)(6) even before *Giles*).

188. *See Giles*, 554 U.S. at 374-76 (plurality opinion) (writing that it is not the norm in our constitutional system of trial by jury for a judge to deprive a defendant of fair-trial rights by making a judicial determination of guilt before a jury has reached its verdict).

189. *Id.* at 374 (plurality opinion).

plurality reasoned that it was not the norm for trial rights to be forfeited on the basis of a prior judicial determination of guilt, but that the boundaries of the doctrine were “intelligently fixed” by recognition of a purpose requirement.¹⁹⁰ The plurality indicated that a judge may, as an exception to ordinary practice, inquire into guilt when making a preliminary evidentiary ruling regarding confrontation forfeiture in instances where a defendant purposefully prevents a witness from testifying, because it is “(1) needed to protect the integrity of court proceedings, (2) based upon longstanding precedent, and (3) much less expansive than the exception proposed by the dissent” in *Giles* that would have omitted a purpose requirement.¹⁹¹ Justice Souter, concurring on behalf of himself and Justice Ginsburg, agreed that “[t]he importance of that intent in assessing the fairness of placing the risk on the defendant is most obvious when a defendant is prosecuted for the very act that causes the witness’s absence, homicide being the extreme example.”¹⁹² The concurrence concluded that “[e]quity demands something more than this near circularity before the right to confrontation is forfeited, and more is supplied by showing intent to prevent the witness from testifying.”¹⁹³

The dissent disagreed with the purpose requirement adopted by the majority.¹⁹⁴ The dissent additionally disagreed that the requirement was needed to avoid violating a defendant’s right to a jury trial, because “preliminary judicial determinations are not, as the majority puts it, ‘akin . . . to “dispensing with jury trial.”’”¹⁹⁵ The dissent further explained:

We have previously said that courts may make preliminary findings of this kind. For example, where a defendant is charged with conspiracy, the judge is permitted to make an initial finding that the conspiracy existed so as to determine whether a statement can be admitted under the co-conspirator exception to the hearsay rule. See *Bourjaily v. United States*, 483 U.S. 171, 175-176 (1987) (“The inquiry made by a court concerned with these matters is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied”). And even the plurality is forced to admit that it is “sometimes”

190. *Id.* at 374-75 (plurality opinion).

191. *Id.* at 374 n.6 (plurality opinion); see *id.* at 383-90 (Breyer, J., dissenting) (asserting that the forfeiture-by-wrongdoing doctrine should apply without regard to a wrongdoer’s purpose or motive).

192. *Id.* at 379. (Souter, J., concurring).

193. *Id.*

194. *Id.* at 387-88, 390-98 (Breyer, J., dissenting).

195. *Id.* at 403.

necessary for a “judge . . . to inquire into guilt of the charged offense in order to make a preliminary evidentiary ruling.”¹⁹⁶

In summary, it appears that all of the Justices in *Giles* would allow trial judges to make coincidental fact determinations when considering confrontation forfeiture. The plurality wrote that “[w]e do not say, of course, that a judge can never be allowed to inquire into guilt of the charged offense in order to make a preliminary evidentiary ruling” and indicated that a judge may do so in a murder case when a defendant purposefully prevented the murder victim from testifying.¹⁹⁷ The concurrence wrote that the purpose requirement adopted in *Giles* satisfied its circularity concerns.¹⁹⁸ The dissent stated outright that it was not concerned with judges making reflexive preliminary findings regarding evidence admissibility.¹⁹⁹ The Missouri Court of Appeals later commented in *State v. Ivey*²⁰⁰ that “*Giles* thus opened the door to application of the forfeiture by wrongdoing doctrine to permit the admission of testimonial hearsay from a *murdered* domestic abuse victim in a subsequent criminal proceeding against the murderer.”²⁰¹

VI. CONCLUSION

The ordinary trial process would be stymied if a judge was unable to make preliminary admissibility determinations touching upon the ultimate issue in a case. As Chief Justice Marshall recognized in *United States v. Burr*,²⁰² someone needs to decide whether evidence is admissible, and a judge must do so by default.²⁰³ For reasons of simple practicality, neither the parties nor the jury are in a position to do so, because the parties disagree and it defies logic for jurors to hear evidence and then decide whether they can consider it.²⁰⁴ “It is of necessity the peculiar province of the court to judge of the admissibility of testimony.”²⁰⁵

196. *Id.*

197. *Id.* at 374 n.6 (plurality opinion).

198. *Id.* at 379 (Souter, J., concurring).

199. *Id.* at 403 (Breyer, J., dissenting).

200. 427 S.W.3d 854 (Mo. App. 2014).

201. *State v. Ivey*, 427 S.W.3d 854, 862 (Mo. App. 2014); *see also* *Jenkins v. United States*, 80 A.3d 978, 997 n.50 (D.C. 2013) (commenting upon the *Giles* plurality’s apparent qualified acceptance of preliminary coincidental fact determinations for forfeiture-by-wrongdoing); *Parker v. Commonwealth*, 291 S.W.3d 647, 669 (Ky. 2009) (same).

202. 25 F. Cas. 55 (C.C.D. Va. 1807) (No. 14,693).

203. *United States v. Burr*, 25 F. Cas. 55, 179 (C.C.D. Va. 1807) (No. 14,693).

204. *See* CHARLES T. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 53, at 122-23 (1954); *see also* *United States v. Enright*, 579 F.2d 980, 987 (6th Cir. 1978) (writing that “it is a practical impossibility for laymen, and for that matter for most judges, to keep their minds in the isolated compartments . . .”).

205. *Burr*, 25 F. Cas. at 179.

Judges have traditionally determined factual issues relating to admissibility of evidence in jury trials.²⁰⁶ This orthodox view has been adopted by modern evidentiary rules.²⁰⁷ Professor Thayer concluded that “the allotment to the jury of matters of fact, even in the strict sense of fact which is in issue, is not exact. The judges have always answered a multitude of questions of ultimate fact, of fact which forms part of the issue.”²⁰⁸ The application of marital privilege in bigamy cases demonstrates that judges have for centuries been making determinations regarding admissibility that coincide with factual issues to be decided by a jury when assessing innocence or guilt.²⁰⁹ This has also been done in conspiracy cases despite the fact that the preliminary question to be resolved by the judge is the same as the one that will be later decided by the jury.²¹⁰ In that situation, it has been recognized that “the fact-finding responsibilities of the judge and jury are distinct.”²¹¹ The same is true with respect to forfeiture-by-wrongdoing. “[A]lthough the two questions may be identical, they are tried separately for separate purposes.”²¹²

The United States Supreme Court ruled in *Giles v. California*²¹³ that the forfeiture-by-wrongdoing doctrine applies only when a defendant purposefully makes a witness unavailable to testify.²¹⁴ The three dissenting Justices in *Giles* expressed no constitutional concern about reflexive forfeiture.²¹⁵ In addition, a plurality of four Justices and concurrence of two more concluded that the inclusion of a purpose

206. See 1 THOMAS STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE 429 (Theron Metcalf ed., Boston, Wells and Lilly 1826); SAMUEL PHILLIPPS, A TREATISE OF THE LAW OF EVIDENCE 13 (John Dunlap ed., New York, Gould, Banks & Gould 1816).

207. See e.g., FED. R. EVID. 104(a) (stating that “the court must decide any preliminary question about whether . . . evidence is admissible.”); EARL WARREN, RULES OF EVIDENCE: COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES, H.R. DOC. NO. 93-46, at 48 (1973) (commenting that judges are responsible under the rule for determining fact issues relating to admissibility).

208. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 202 (Boston, Little, Brown, and Company 1898); see e.g., *State v. Lee*, 54 So. 356, 357 (La. 1911).

209. See *Mary Griggs’s Case* (1660) 83 Eng. Rep. 1; Raym. Sir. T. 1; THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 128 (Walpole, Thomas & Thomas 1804).

210. *Carbo v. United States*, 314 F.2d 718, 736-37 (9th Cir. 1963); see also ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE IN CIVIL AND CRIMINAL CASES AND A TREATISE ON BILLS OF EXCHANGE AND PROMISSORY NOTES 156 (Hartford, Oliver D. Cooke 1810).

211. *United States v. Enright*, 579 F.2d 980, 985 (6th Cir. 1978).

212. Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 523 (1997).

213. 554 U.S. 353 (2008).

214. *Giles v. California*, 554 U.S. 353, 359-68 (2008).

215. *Giles*, 554 U.S. at 403 (Breyer, J., dissenting).

requirement satisfies concerns about circularity and preservation of a criminal defendant's right to have guilt determined by a jury.²¹⁶

A defendant is not deprived of a jury trial when a judge makes a preliminary factual finding because the judge is ruling solely on admissibility of evidence.²¹⁷ "The fact of the admission of the evidence by the judge does not in a legal sense give it any greater weight with the jury; it does not affect the burden of proof, or change the duty of the jury in weighing the whole evidence."²¹⁸ A judicially made forfeiture determination does not threaten the integrity of a jury trial or the presumption of innocence, because it does not predetermine the outcome of a case, and the prosecution must still prove a defendant's guilt beyond a reasonable doubt.²¹⁹

The forfeiture-by-wrongdoing doctrine is founded on the equitable principle that no one should be allowed to take advantage of his or her own wrong.²²⁰ It does not contain a subject matter limitation or loophole as long as requirements for its application are met.²²¹ Therefore, a court faced with the question of forfeiture-by-wrongdoing "should not decline to decide the predicate question for evidentiary purposes, simply because the same question must also be decided in making the bottom-line determination of guilt."²²²

216. *Id.* at 374-75 n.6 (plurality opinion); *Id.* at 379 (2008) (Souter, J., concurring).

217. *United States v. James*, 576 F.2d 1121, 1132 (5th Cir. 1978), *modified en banc*, 590 F.2d 575, 577-80 (5th Cir. 1979).

218. *Commonwealth v. Robinson*, 16 N.E. 452, 456 (Mass. 1888).

219. *People v. Giles*, 152 P.3d 433, 445 (Cal. 2007), *vacated on other grounds by Giles*, 554 U.S. at 355-73, 376-77; *Jenkins v. United States*, 80 A.3d 978, 997-98 (D.C. 2013).

220. *Reynolds v. United States*, 98 U.S. 145, 159 (1878); *see also* GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 141 (London, Henry Lintot 1756).

221. *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999).

222. Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 *ISR. L. REV.* 506, 522 (1997); *cf.* *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969) ("The circumstance that in a conspiracy trial the preliminary issue on the admissibility of evidence coincides with the ultimate one of the defendant's guilt should not cause the trial judge to abdicate his traditional duty to decide those issues of fact which determine the applicability of a technical exclusionary rule.").