DICTA REDEFINED

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I. INTRODUCTION

The law of stare decisis contains two basic and virtually undisputed principles. First, the doctrine of vertical stare decisis requires lower courts to follow a higher court's holdings.[1] Second, lower courts are not bound to follow the dictum of a higher court.[2] Despite the surface-level distinction between holdings and dicta, courts often treat dicta no differently than case holdings,

1. See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 379 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend . . . ."). Most courts and scholars agree that judges are only presumptively bound to follow the holdings of a higher court, and that judges can depart from precedent in narrow circumstances. See, e.g., Michael C. Dorf, Dicta

frequently cited as the sole support for a lower court's ruling.[4] At the extremes, some courts treat dicta as formally binding,[5] while others dismiss dicta outright.[6]

Because dicta can, in practice, range from binding to wholly unpersuasive, the formalistic categories of holding and dicta require more exacting scrutiny.[7] Approaching the issue from a pragmatic

argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the cause, if dictum, is a judicial dictum. . . . [A] judicial dictum is entitled to much weight, and should be followed unless found to be erroneous."); City of Fresno v. Super. Ct., 82 Cal. App. 3d 191, 194 (1978) ("Dicta may be highly persuasive, particularly where made by the Supreme Court after that court has considered the issue and deliberately made pronouncements thereon intended for the guidance of the lower court upon further proceedings.").

4. See, e.g., Doan v. Carter, 548 F.3d 449, 458 (6th Cir. 2009) (rejecting petitioner's Confrontation Clause challenge to the admission of certain out-of-court statements by declaring such statements non-testimonial, relying as its sole support dicta from Giles v. California, 128 S. Ct. 2678, 2682–83 (2008)).

5. Some courts declare themselves bound by statements made in dicta, proclaiming that dicta "should be followed in the absence of some cogent reason for departing therefrom." State v. Fahringer, 666 P.2d 514, 515 (Ariz. Ct. App. 1983).

6. Courts sometimes employ this method of argument in a questionable manner.

vibrant dicta, nor is it dismissed outright. Given its ambiguity and questionable persuasiveness, divergent dictum prompts scholarly commentary and lower court development of the issue discussed in dicta. Divergent dictum is often marked by disagreement as to the dictum's persuasiveness and effect. The recent case, Giles v. California, is illustrative. In Giles, the Supreme Court noted the possibility of a specialized forfeiture-by-wrongdoing rule for domestic abuse cases.[22] As in J.L., the Giles dictum is included at the end of the Court's opinion, and is not necessary to resolve the decided issue.[23] Despite this similarity, and in contrast to the near uniform approval of the J.L. dictum, lower courts wrestling with the Giles dictum have reached startlingly diverse conclusions as to its meaning and effect.[24]

Given the similarities between the J.L. and Giles dictum, their differing treatment signals a need to examine why some dicta are uniformly accepted while others are not. This article engages in that endeavor. By comparing examples from each dicta category, this article identifies five factors that influence the path of a particular dictum: (1) the number of judges that endorsed the dictum; (2) the depth of the issuing court's discussion of the dictum; (3) whether the dictum clarifies a line of demarcation in existing case law; (4) the relationship between the facts of the case and the statements made in dictum; and (5) the extent to which the issuing court stands by the pronouncements made in dictum.

Part II of this article examines the traditional definitions of holding and dicta, and highlights the need for refinement of that distinction. Part III discusses the prevalence of dicta-planting, arguing that judges sometimes utilize dicta to influence issues not yet before the court. Part IV provides examples of each pragmatic category of dicta: dead dicta, vibrant dicta, and divergent dicta. Part V examines factors that determine whether a statement made in dictum will become the law. Part VI concludes.

II. DICTA DEFINED

Generally speaking, case holdings are binding upon future

22. *See* *Giles*, 128 S.Ct. at 2693.

23. While some courts have characterized the disputed *Giles* statements as part of the case holding, they are more properly classified as dicta. *See infra* note 186.

24. See infra notes 197–215 and accompanying text.

within the more particular subset of statements addressing issues beyond those resolved in the case.[31] While courts generally agree that such statements are not technically binding,[32] some courts, but only a

dicta are often treated more persuasively than obiter dicta, although neither type of statement is controlling.

Applying its broad, "basic tools" rationale, the Court deemed "the assistance of a psychiatrist . . . crucial to the defendant's ability to marshal [an insanity] defense."[60] To justify this outcome, the Court emphasized the critical role of the psychiatrist in accurately assessing insanity claims, thereby providing a narrower, more case-specific rationale.[61]

The tension between Ake's narrow "facts-plus-outcome" holding and its extremely broad principles has generated disagreement regarding the scope of the Ake right,[62] particularly as it relates to non-capital cases[63] and non-psychiatric witnesses.[64] In those instances, the analysis turns on whether Ake's broad rationale is classified as binding, as highly persuasive judicial dicta, or as unpersuasive obiter dicta.

Considering the alternative articulations of the case holding — which require consideration of Ake's material facts, its outcome, and

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provision of a free trial transcript to indigent defendants for certain appeals. *Id.* at 76. The Court cited to another case, establishing that indigent defendants are not required to pay a fee before filling a notice of appeal. *Id.* (citing Burns v. Ohio, 360 U.S. 252 (1959)). In a third example, the Court noted the established rules that indigent defendants are entitled to the assistance of counsel, both at trial, Gideon v. Wainwright, 372 U.S. 335 (1963); and on his first direct appeal as of right, Douglas v. California, 372 U.S. 353 (1963). *Id.* Finally, the Court cited Little v. Streater, 452 U.S. 1 (1981), which establishes that, in a paternity action, the State cannot deny the putative father blood grouping tests, if he cannot otherwise afford them. *Id.* In the Court's words, "[m]eaningful access to justice has been the consistent theme of these cases." *Id.* at 77.

60. Ake, 470 U.S. at 80.

61. According to the Court, "psychiatrists gath

its rationale — the critical facts of the case are that: (i) Ake was subject to a death sentence; (ii) Ake's sole defense during the guilt phase was insanity; (iii) Ake had sufficiently identified his sanity as a significant factor at trial; and (iv) not a single expert examined Ake regarding his sanity at the time of the offense. The outcome is that due process mandates assistance of at least one expert witness under such circumstances. Ake's rationale can be broadly or narrowly stated. Broadly, Ake's rationale is that due process requires states to provide indigent defendants the "basic tools of an adequate defense or appeal," reasoning that readily accommodates other types of experts. More narrowly, Ake's rationale is that psychiatric assistance is necessary to enable meaningful assessment of an insanity claim, particularly in capital cases.

At one extreme, a case holding that encompasses only Ake's facts and outcome would leave courts free to disregard Ake's sweeping rationale, and would enable courts to limit Ake to insanity claims.[65] Because the facts of Ake are truly unique, choosing to read Ake's holding narrowly would permit courts to dismiss nearly every Ake-based claim.[66]

At the other extreme, Ake's broad "basic tools" rationale can reasonably be deemed binding, either as part of the ratio decidendi, defined as the rule of law on which the court's decision is founded,[67] or as an otherwise binding aspect of the case.

Ake's statement that states must provide the "basic tools of an adequate defense or appeal" for all indigent criminal defendants is, arguably, Ake's ratio decidendi.[68] Further, even if this rationale is not

65. *See* *Ake*, 470 U.S. at 77 (holding that "[i]n this case we must decide whether. . . the participation of a psychiatrist is important enough to require the state to provide an indigent defendant with access").

66. *See* Peter J. Smith, *The Marshall Court and the Originalist's Dilemma*, 90 MINN. L. REV

part of Ake's ratio decidendi, it may still be deemed binding. The United States Supreme Court, in Seminole Tribe of Florida v. Florida, deemed itself "bound" by the "well-established rationale upon which the Court based the results of its earlier decisions."[69] The "well-established rationale" referenced in Seminole Tribe is the broad principle underlying the Eleventh Amendment preventing congressional authorization of suits by private parties against non-consenting States,[70] a principle denoted as "the background principle of state sovereign immunity embodied in the Eleventh Amendment."

distinction between holdings and dicta cannot determine the persuasive influence of a court's rationale. More is required to make such a determination, and the multi-factor approach set forth in Part V provides the needed framework.

III. JUDICIAL DICTA-PLANTING

Appellate judges are careful writers, and are familiar with the principle opposing advisory opinions.[80] Yet passages that are obviously dicta appear throughout their opinions, particularly those addressing how the court might decide a different case. This begs the

been easily deleted without altering the decision or its supporting logic.

While there are many possible explanations for the prevalence of dicta,[81] I argue that judges sometimes plant dicta into their opinions to subtly influence the law's development,[82] and that this practice will continue precisely because it is effective.[83] Judge Pierre N. Leval, a Second Circuit Court of Appeals judge, candidly addressed why

issue [differently].[85] Speaking from experience, Judge Leval notes that fellow judges do not carefully scrutinize statements made in dicta.[86] In light of those realities, judges have little to lose by the inclusion of dicta.

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> generalization after generalization up, and discharged it at your goal; all, in the heat of argument, were over-stated. . . .
>
> So with the judge. . . . [A]s a practiced campaigner in the art of exposition, he has learned that one must prepare the way for argument. . . . You wind up, as a pitcher will wind up – and as in the pitcher's case, the wind-up often is superfluous. As in the pitcher's case, it has been known to be intentionally misleading.
>
> With this it should be clear, then, why our canons thunder. Why we create a class of dicta, of unnecessary words, which later readers, their minds now on quite other cases, can mark off as not quite essential to the argument. Why we create a class of obiter dicta, the wilder flailings of the pitcher's arms . . . .[94]

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With a limited docket and a ruling on the issue by the courts below, the Court appeared poised to resolve not only the controlling framework, but also the merits of Quon's privacy claim, an issue "of farreaching significance" to the Court.[105] Instead, the Court avoided both issues by declaring the City's search reasonable.[106]

Although the Court treated the privacy issue as superfluous to its decision, the Court engaged in a multi-paragraph musing on the reasonableness of Quon's claim.[107] The Court noted various factors that would influence the analysis. The Court stated, for example, that "many employers . . . tolerate personal use of [cell phones] because it

practical value.

In contrast to the traditional dicta categories, the categories proposed in this article better depict a dictum's persuasive influence. By examining case examples within each proposed category, it is possible to identify a host of factors that enable a more accurate prediction of a dictum's actual persuasive value.

A. Vibrant Dicta — When Dicta Becomes the Law

A pragmatic approach reveals three distinct categories of appellate court dicta: "vibrant dicta," "dead dicta," and "divergent dicta."

Dictum is "vibrant" when it promptly and consistently flowers into law. When this occurs, the distinction between case holdings and dicta is effectively obliterated.[121]

There are countless examples of dicta becoming the law. Broadly, dicta can be converted to law either by the court that issued the dicta or by other courts. An example of the latter category is reflected in the lower courts' treatment of dictum from Florida v. J.L., which holds that an anonymous tip does not justify detaining a suspect for questioning based upon the tip's unsubstantiated allegation that the suspect is armed.[122]

In J.L., an anonymous caller informed police that "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun."[123] Officers later observed a person fitting the description.[124] Nothing about the suspect's behavior aroused suspicion and no gun was visible.[125] One of the officers then seized and frisked the suspect, J.L., and discovered an illegal weapon.[126]

After being charged with unlawful possession of a firearm, J.L.

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law."). On the flipside, if a judge wishes to disregard a dictum, its particular classification simply determines the extent to which the judge must defend his opinion.

121. See Dictum Revisited, *supra* note 7, at 512 ("[w]hile it may be theoretically true to say that [dicta] are not followed [under the doctrine of stare decisis] as [binding] precedent, it is very difficult in practice to distinguish between following a statement of law in one way and following it in another.").

122. 529 U.S. 266 (2000). This particular example is discussed at length in Melanie D. Wilson, Since When is Dicta Enough to Trump Fourth Amendment Rights? The Aftermath of Florida v. J.L, 31 OHIO N.U. L. REV. 211 (2005).

123. J.L., 529 U.S. at 268.

124. Id.

125. Id.

126. Id.

successfully moved to suppress the gun,[127] and the Florida Supreme Court affirmed.[128] The United States Supreme Court later ruled, in a 9–0 decision, that the lack of police corroboration made the anonymous tip insufficiently reliable.[129] Before closing its opinion, the Court noted that anonymous, uncorroborated tips might prove sufficiently reliable where the tip alleges a more significant public danger.[130] In dicta,[131] the Court declared:

> The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm. . . . In [this case], we [simply] hold that an anonymous tip lacking [sufficient] indicia of reliability . . . does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm.[132]

In a non-emergency situation, J.L. deemed an anonymous tip insufficient to justify a Terry stop. The J.L. dictum implies a different outcome in cases of heightened public danger. Consistent with J.L.'s dictum, every federal appellate court to have considered the question has distinguished J.L. when an anonymous tip alleges not just general criminality, but an ongoing emergency.[133] A number of those courts

127. Id. at 269.

128. Id. Two Florida Supreme Court justices dissented. Significantly, these dissenters argued that the safety of the police and the public justifies a "firearm exception" to the rule barring investigatory stops and frisks on the basis of bare-boned anonymous tips. Id.

129. Id. at 274. Because the J.L. officers had not corroborated the substance of the tip, as in Alabama v. White, the J.L. dissenters office5(ve cdu v)ct uno justinted.e

corroboration contemplated by J.L. would almost never be possible.[139] Along with the assurances of a unanimous J.L. Court, these underlying considerations have prompted a nearly universal approval of the J.L. dictum by the lower federal courts.

B. Dead Dicta — When Dicta is Relegated to "Mere Dicta"

"Dead dicta" is dicta that is generally deemed non-binding. A dictum can die explicitly through a court's pronouncements, or implicitly through rulings rejecting the dictum.

When a court wishes to declare a dictum non-binding, the court often designates the passage "mere dicta,"[140] thereby preventing the dictum from flowering into law. Attachment of the "mere dicta" label is sometimes performed by the very court that issued the dictum. An example of this dicta type is seen in United States v. Salerno.[141]

sovereign must not act as the "mere puppet" of another.[156] The sham exception has been entirely rejected by many courts as the product of "mere dicta,"[157] and has been narrowly interpreted by most others.[158]

v. 38 Whalers Cove Dr., 954 F.2d 29, 38 (2d Cir. 1992) ("the Double Jeopardy Clause prohibits two criminal punishments for the same offense only when they are sought by the same sovereign government. The Double Jeopardy Clause is inapplicable when separate governments prosecute the same defendant, for the defendant has offended both sovereigns"); In re Kunstler, 914 F.2d 505, 517 (4th Cir. 1990) ("Although a 'tool of the same authorities' exception is possible in some circumstances, that exception may only be established by proof that State officials had little or no independent volition in their proceedings. In this case, however, the complaint alleged that the state officials instituted and controlled the state proceedings. We [illegible] precludes the establishment of that exception." (citations omitted)); United States v. Wurts (In re Edison), 284 F.2d 84, 87–88 (2d Cir. 1960) (recognizing [illegible]

The typical approach to the Bartkus dictum is exemplified by United States v. Bernhardt.[159] In that case, a federal trial court applied the sham exception, but the Ninth Circuit Court of Appeals reversed.

"sufficient as a matter of law to invoke the 'narrow [sham] exception.'"[163] Remanding the case for further factual development, the court concluded that "sufficient independent federal involvement would save the prosecutions from the [sham] exception," and specifically noted the "several Assistant United States Attorneys [who] may have worked on the Bernhardt prosecutions."[164] Upon further appeal, the Ninth Circuit found "no obstacle to completion of this case."[165]

As Bernhardt exemplifies, despite the sham exception's grounding in United States Supreme Court case law, the exception has been largely rejected as "mere dicta,"[166] whereas the J.L. dictum, which shares similar roots, has not.[167] Along with the categories of vibrant dicta and dead dicta, one additional category of pragmatic dicta remains.

C. Divergent Dicta — When Dicta Spurns Disagreement

The final dicta category is best described as "divergent." Neither dead nor vibrant, this type of dicta does not promptly flower into law, nor is it dismissed outright as "mere dicta." Rather, divergent dictum prompts scholarly commentary and lower court development of the dictum, and is generally marked by disagreement as to the dictum's effect. The category of divergent dicta is often characterized by more ambiguous wording than what appears in vibrant dicta such as that in J.L., and typically includes internal disagreement among the judges of the issuing court. An example of this dicta type is contained in Giles v. California,[168] a Supreme Court opinion determining the circumstances under which a criminal defendant will forfeit his Sixth Amendment confrontation right through his wrongdoing.[169]

Before Giles, the Court in Crawford v. Washington deemed the Sixth Amendment violated when a testimonial statement is admitted without opportunity to cross-examine the out-of-court declarant,[170]

163. Id.

164. Id.

165. United States v. Bernhardt, 840 F.2d 1441, 1452 (9th Cir. 1988).

166. See supra notes 157–158.

167. See supra notes 133–134 and accompanying text.

168. 128 S.Ct. 2678 (2008).

169. See id. at 2682 (framing the issue as "whether the theory of forfeiture by wrongdoing accepted by the California Supreme Court is a founding-era exception to the confrontation right.").

170. Crawford v. Washington, 541 U.S. 36, 59 (2004) (stating "[t]estimonial statements

anticipating those concerns, the Crawford Court declared the need for an expansive forfeiture exception, yet failed to delineate its precise scope.[178]

Between 2004 and 2008, lower courts sought to resolve whether forfeiture should be triggered by any wrongdoing that effectively prevents a witness from testifying, or instead whether the wrongdoer must further intend to prevent such testimony.[179] After four years and a lower court split,[180] the Court resolved the issue in favor of the latter interpretation.[181] According to the Court's opinion in Giles v.

178. Crawford, 547 U.S. at 61–62 (The Crawford Court ratified a seemingly broad forfeiture exception, declaring that "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds."). *See also* Davis, 547 U.S. at 833 ("[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. . . . We reiterate . . . that 'the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.' That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.") (emphasis in original).

179. In certain instances of wrongdoing, the forfeiture exception clearly trumps the defendant's confrontation right. For example, when a criminal defendant has successfully bribed or intimidated a witness, the defendant's actions strongly suggest an intent to prevent the witness from testifying. *See* Giles, 128 S. Ct. at 2691 ("The common-law forfeiture rule was aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them . . ."). But unlike the bribery context, where the briber's very actions reveal his intent, not all "wrongful acts" that lead to the witness's absence from trial should necessarily trigger the forfeiture exception. For example, a defendant who negligently collides into a witness's automobile the evening before trial, causing her to miss her scheduled testimony, would not forfeit his confrontation right. *See* People v. Giles, 19 Cal. Rptr. 3d 843, 850–51 (Cal. Ct. App. 2004) (providing a similar example). This is true even though the defendant's negligence is considered "wrongful." Between these extremes, however, is a plethora of wrongdoing that may or may not trigger the forfeiture exception.

180. *See* State v. Romero, 133 P.3d 842, 850 (N.M. Ct. App. 2006) ("Despite widespread acceptance of the doctrine of forfeiture by wrongdoing, however, there has been some confusion over its requirements. Specifically, courts have disagreed over the [applicability

California, the forfeiture exception is triggered by proving both an actus reus, consisting of an act of wrongdoing that prevents a witness from testifying, coupled with a mens rea, requiring proof of a specific intent to prevent such testimony.[182]

After articulating and defending its specific intent requirement, and after fully resolving the case and summarizing its reasoning,[183] the Giles majority turned its focus to the dissent.[184] In the final section of its opinion, the Giles majority responded to the dissent's proposal of a more lenient standard in domestic abuse cases.[185] The Court, in dicta,[186] declared:

> The dissent closes by pointing out that a forfeiture rule which

forfeiture exception through analysis of the historical record).

182. See id. at 2684. See also Crawford v. Commonwealth, 686 S.E.2d 557, 564 (Va. Ct. App. 2009) (en banc) ("the Supreme Court made clear in Giles that the [forfeiture by wrongdoing] doctrine only applied 'when the defendant engaged in conduct designed to prevent the witness from testifying.' Thus, under the doctrine of forfeiture by wrongdoing, 'unconfronted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying.'") (citing Giles, 128 S. Ct. at 2683-84); In re Rolandis G., 902 N.E.2d 600, 615 (Ill. 2008) ("The [Giles] Court held that at common law an unconfronted testimonial statement could not be admitted without a showing that the defendant intended to prevent the witness from testifying. In other words, according to the Court, for forfeiture by wrongdoing to apply, the evidence had to show that the defendant engaged in witness tampering or some type of conduct designed to prevent the witness from testifying, thwart the judicial process, or procure the witness' absence from trial.") (citing Giles, 128 S.Ct. at 2683–84).

183. See Giles, 128 S. Ct. at 2688 (summarizing the four primary arguments supporting the Court's interpretation of the common-law forfeiture rule).

184. See id. at 2688–93.

185. See id. at 2693.

186. While some courts have characterized the disputed Giles statements as part of its holding, they are more properly classified as dicta. See Sarnoff v. Am. Home Prods. Corp., 798 F.2d 1075, 1084 (7th Cir. 1986) (While one could debate whether this passage is actually dicta, reading this passage as dicta is appropriate because it "could have been deleted without seriously impairing the analytical foundations of the holding . . . ."). See also State v. Koput, 418 N.W.2d 804, 810–11 (Wis. 1988) (overturning the lower appellate court's decision, in part, because "[t]he portion of the opinion . . . on which the court of appeals relied was not essential to the . . . rationale [of the case] . . . [it] could have been omitted without doing violence to the logic of the opinion," and is therefore "irrelevant to the ratio decidendi"); Leval, supra note 12, at 1256 ("If the court's judgment and the reasoning which supports it would remain unchanged, regardless of the proposition in question, that proposition plays no role in explaining why the judgment goes for the winner. It is superfluous to the decision and is dictum."); RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 19 (1961) ("the only 'binding' aspect of a case is . . . 'that part of it, called the ratio decidendi, which is considered to have been necessary to the decision of the actual issue between the litigants.'") (citing GLANVILLE L. WILLIAMS, CLETON K. ALLEN, LAW IN THE MAKING 241–42 (1967)).

The Giles dictum could, for example, permit a court to infer the requisite Giles intent based solely upon the fact of the relationship.[190] In his concurrence, Justice Souter read the Giles dictum to mean that "[the requisite] element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship."[191] Expounding upon Justice Souter's reading, Justice Breyer's dissent argued that such an inference of intent "is in effect not to insist upon a showing of 'purpose.'"[192] In Justice Breyer's view, it makes little sense to require proof of a purposeful silencing of the would-be witness if the requirement can be proven by the mere nature of the typical abusive relationship.[193] This, however, is a reasonable interpretation of the Giles dictum.

Third, the above-quoted passage is internally inconsistent. Justice Breyer's dissent notes that this passage "creat[es] a kind of presumption that will transform purpose into knowledge-based intent—at least where domestic violence is at issue."[194] While the second paragraph of the above-quoted passage supports Justice Breyer's reading, the first paragraph purports to reject the dissent's view. This internal inconsistency adds further ambiguity to the passage, which, in turn, makes the Giles dictum malleable in the hands of future courts.

Fourth, in the final sentence of the above passage, the majority appears to concede that the requisite showing of intent might be inferred from distant interactions between the defendant and witness, even if the act of wrongdoing itself (e.g., the killing of the witness) involved no such intent, and even if those distant actions occurred long before the requisite act of wrongdoing.[195] As the final sentence's

190. But see In re Rolandis G., 902 N.E.2d 600, 614 (Ill. 2008) (refusing to presume the requisite Giles intent based upon the fact of abuse alone).

191. Giles, 128 S.Ct. at 2682 (Souter, J., concurring in part).

192. Id. at 2708 (Breyer, J., dissenting).

193. See id. (noting that under Justice Souter's reading of the Giles dictum, a "showing of domestic abuse is sufficient to call into play the protection of the forfeiture rule in a trial for murder of the domestic abuse victim," and that "[d]oing so when, in fact, the abuser may have had other matters in mind apart from preventing the witness from testifying, is in effect not to insist upon a showing of 'purpose'").

194. Id.

195. See Marc McAllister, Down But Not Out: Why Giles Leaves Forfeiture by Wrongdoing Still Standing, 59 CASE W. RES. L. REV. 393 (2009). See also State v. Her, 781 N.W.2d 869, 874 (Minn. 2010) (remanding for determination of defendant's intent under Giles, and explaining that in a case decided before Giles, "we did not require any showing that the defendant intended to prevent his wife from testifying against him," but that "there was evidence in [that case] that, approximately four years before the murder, the defendant had

wording and structure reveal, this evidence is separate and apart1t8G "evidence of ongoing criinal proceedings at which the victim would have been expected to testify."[196] By lc7(oosening the)6(link between the)6( )]TJ -0.0006 Tc "cooperating with a criminal prosecution" is much broader in and provides ore avenues of proof for the prosecution than ir prevent trial testimony. As such, this particular passage ap broaden the Giles requirement, expanding the requisite i preventing trial testimony to the broader intent of preventing a of cooperation.

Given the perplexing nature of the Giles dictum, lower courts interpreting the passage have reached incredibly diverse conclusions as to its eaning and effect. This divergent treatment is exeplified by the cGpeting arguments in Crawford v. Commonwealth.[197] In Crawford, defendant Anthony Crawford was charged with murdering

threatened to murder the victim if she repodhis abuse to the police." According to the court, "[e]vidence of this type of threat would be relevant evidence under the standard announced inGiles."). See also id.at 877 (discussing theGiles dicta, and advising the lower court that "'[e]arlier abuse, or threats of use, intended to dissuade the victim t8Gesorting

Giles passage as binding, the majority "left open the possibility that a defendant's intention to prevent testimony might be inferred from the

testifying, but also to acts more generally intended to dissuade a witness from cooperating with law enforcement.[215]

IV. FACTORS THAT INFLUENCE THE PATH OF A PARTICULAR DICTUM

As the foregoing discussion reveals, dicta can take one of three paths. It can become generally accepted law, it can lose all persuasive

that it should. While Bayern's argument is premised upon one primary factor — the issuing court's intent—my argument is a multi-factor approach.

As exemplified by the above case illustrations, the following factors should be considered in determining the path of a particular dictum:

The number of higher court judges that endorsed the particular dictum;

The depth of the issuing court's discussion of the issue raised in dictum;

Whether statements made in dictum are employed to establish a line of demarcation in an incomplete body of case precedents;

The extent to which the issuing court stands by its pronouncements; and

The relationship between the facts of the case and the pronouncements.

Before examining each of these factors, it is important to clarify the effect of the formal positions taken by reviewing courts on the persuasiveness of a higher court's dicta, particularly those relating to the obiter dicta/judicial dicta distinction. When considering whether a particular dictum will be endorsed by a majority of jurisdictions, experience proves that formal rules regarding the persuasiveness of dicta are not dispositive. While a particular reviewing court's formal position regarding the persuasiveness of dicta may prove influential in

between sufficient and insufficient anonymous tips, the line was made even clearer by the J.L. Court's final paragraph of dictum. Thus, it is not surprising that post-J.L. courts have relied upon the J.L. dictum to justify their rulings in cases contemplated by the J.L. Court.

The same cannot be said for the Bartkus dictum. Rather than shedding light upon a developing body of factually-related precedents, the Bartkus dictum hints of an entirely new avenue of argument for double jeopardy claimants. Unlike the J.L. dictum, which was preceded by the White line of cases and which fell in step with those precedents, the Bartkus dictum was a creation of the Bartkus Court. Thus, the Bartkus dictum was far more speculative than its J.L. counterpart, which makes the Bartkus dictum less likely to gain traction.

D. Factor 4: The extent to which the court stands by its pronouncements[238]

Another factor affecting a dictum's persuasiveness is the extent to which the issuing court stands by its pronouncements. This is evidenced by both the wording employed by the issuing court, and, to the extent time has passed since the dictum was issued, the court's subsequent statements regarding its dictum.

Dicta stated with certainty, clarity, and forcefulness, are more persuasive than statements made tentatively or conditionally. The Seventh Circuit Court of Appeals deemed this factor particularly persuasive. According to the Seventh Circuit,

When the [Supreme] Court's view is embodied in . . . a recent dictum that considers all the relevant considerations and adumbrates an unmistakable conclusion, it would be reckless to think the Court likely to adopt a contrary view in the near future. In such a case the dictum provides the best . . . guide to what the law is, and it will ordinarily be the duty of a lower court to be guided by it.[239]

The degree to which the issuing court has later weakened its own dictum is also potentially relevant. In declaring itself bound by