CENTER PIECE

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Using the Forfeiture by Wrongdoing Confrontation Clause Exception in Child and Domestic Abuse Cases after *Giles v. California*

Introduction

In *Giles v. California*, 2008 U.S. Lexis 5264, 1 (U. S. June 25, 2008), the United States Supreme Court, in a deeply fractured opinion, held that the forfeiture by wrongdoing exception to confrontation could only be used to admit testimonial out-of-court statements when the prosecutor could show the defendant acted intentionally with the purpose of causing the witness to be unavailable to testify at trial. See id. at 11-15. *Giles* is an attempt to clarify the Court's earlier reference to forfeiture by wrongdoing in *Crawford v. Washington*, 541 U.S. 36 (2004).

This article provides a brief overview of the definition of "testimonial" which arose in *Crawford*. It is this definition of "testimonial" that has made the doctrine of forfeiture by wrongdoing a vital tool for prosecutors in cases of child and domestic abuse. This article discusses the application of this doctrine in the wake of *Giles* and offers several suggestions for prosecutors.

Crawford and the new definition of "testimonial"

In *Crawford,* the Court held that the Confrontation Clause prohibited the use of testimonial out-of-court statements of an unavailable witness at trial unless the defendant had a prior opportunity for cross-examination. *Id*. at 53-54. *Crawford* indicated that out-of-court statements would be considered testimonial if they were taken by law enforcement officers under circumstances that objectively indicate to a reasonable person that the statements could be used in a later criminal prosecution. *Id*. at 51-53.

Crawford was a major change in the Court's interpretation of the Confrontation Clause because it jettisoned the previous test for admissibility of out-of-court statements as stated in *Ohio v. Roberts*, 448 U.S. 56 (1980). *Roberts* had held that out-of-court statements were admissible without violating confrontation rights if the statements were reliable and there was a showing of necessity. *Crawford* reversed *Roberts* and held reliability of the out-of-court statements was not dispositive because reliability analysis was too amorphous. See id. at 62-64; see also *Davis v. Washington*, 126 S. Ct. 2266, 2275 n.4 (2006).

Crawford did, however, acknowledge an exception to the general rule prohibiting admissibility of testimonial out of court statements. This exception, known as "forfeiture by wrongdoing," is premised on the belief that an accused forfeits his right of confrontation if he prevents or otherwise is responsible for a witness' unavailability. *Crawford*, at 62. *Crawford* stated that both its Confrontation Clause analysis and its analysis of the forfeiture by wrongdoing exception were based on the "original meaning" of the doctrines at the time of the Founders. *Id*. at 53-56.

The importance of forfeiture by wrongdoing in cases of child abuse

The forfeiture by wrongdoing exception to confrontation is an important one, especially in domestic and child abuse cases. This is because many child and domestic abusers threaten, harm, murder, or take other actions that cause the witness to be unavailable to testify at trial. See, e.g., Tom Harbinson, *Using the Crawford v. Washington "Forfeiture by Wrongdoing" Confrontation Clause Exception in Child Abuse Cases*, Reasonable Efforts, vol. 1, no. 3 (2004) available at www.ndaaorg/ publications/ newsletters/reasonable_efforts_volume_1_ number_3_2004.html (last visited July 8, 2008). *Giles* illustrates many of the difficulties with the successful prosecution of these cases.

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In *Giles*, the defendant had murdered the domestic abuse victim but at trial raised the claim of self defense. *Giles*, at 4-8. In order to rebut this defense the State introduced statements the victim had made to police during an earlier domestic abuse incident. The defense objected to the admissibility of these statements because it claimed admission of these statements was testimonial and violated the defendant's right of confrontation. *Id* at 7-8. The trial court ruled the statements were admissible under the forfeiture by wrongdoing doctrine. Stated in its simplest terms, the trial court found the defendant forfeited his right of confrontation when he murdered the witness.

The California Supreme Court affirmed and held that the forfeiture by wrongdoing doctrine did not require a showing that the defendant acted with the purpose or intent-to-silence the witness, but only that the defendant's wrongful acts caused the witness to be unavailable to testify. See *People v. Giles*, 152 P.3d 433, 441 (Cal. 2007).

In an opinion written by Justice Scalia, joined in its entirety only by Justices Thomas, Alito and Chief Justice Roberts, the U.S. Supreme Court reversed and remanded in order for California courts to address whether the facts would allow an inference of intent to make the witness unavailable for trial. *Giles*, at 4, 43-42.

Giles clarifies the "intent" necessary in applying forfeiture by wrongdoing doctrine

In *Giles*, the U.S. Supreme Court held that the forfeiture by wrongdoing doctrine can only be used when the defendant's acts causing the unavailability of a witness were made with the purpose and specific intent of making the witness unavailable to testify at trial. *Id*. at 12-13. Justices Thomas and Alito concurred separately to note that they did not believe that the out-of-court statements admitted in *Giles* were testimonial but, since the State had not contested the point, they joined in the majority opinion. See id. at 42-44. Interestingly, as to whether the statements in *Giles* were testimonial, the majority opinion only stated, "(t)he State does not dispute here, and we accept without deciding, that Avie's statements accusing *Giles* of assault were testimonial." *Id*. at 8. Perhaps Justice Scalia used this language because he was required to do so in order to keep his majority.

Justice Souter concurred in part, and was joined by Justice Ginsburg, stating that the equity doctrine of forfeiture by wrongdoing required, no matter what the history of the doctrine showed, that an intent requirement to make the witness unavailable was necessary. Otherwise, the doctrine would have "near circularity." *Id*. at 45-46. Justice Souter felt circularity existed in the California court's interpretation of forfeiture doctrine because the trial judge determined, based on a preponderance of evidence, that the defendant murdered the witness and this finding allowed the trial court to admit the out-of-court statements in the underlying murder case. *Id*. Justice Souter thought requiring intent on the defendant's part was only fair because the defendant was "being prosecuted for the very act that causes the witnesses absence, homicide being the extreme example." *Id*. at 44-45. Justices Souter and Ginsberg appeared to imply, however, that the necessary showing of intent to make the witness unavailable to testify could possibly be made in cases where intent could be inferred in the "the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process." *Id*. at 47.

Justice Breyer's dissent

In a strong dissenting opinion by Justice Breyer, joined by Justices Stevens and Kennedy, he stated that the history of forfeiture by wrongdoing strongly suggested the doctrine was applicable without a showing of purpose to make the witness unavailable to testify at trial. *Id*. at 47- 64-68. The dissenters held that requiring a showing of purpose was inconsistent with the equity rationale of the forfeiture by wrongdoing doctrine. The defendant's wrongdoing was not any less wrongful because he murdered the witness as an act of domestic violence rather than with the purpose to make her unavailable to testify. *Id*. at 51-55, 60. Given the facts present in *Giles*, Breyer found it was reasonable to infer that the defendant's intent could be reasonably foreseen to have included making the witness unavailable for any future trial. *Id*. at 55-60.

The dissent also made it clear that an originalist analysis of forfeiture doctrine should not be controlling: "modern courts have changed the common law-forfeiture rule—in my view, for the better," by not requiring forfeiture by wrongdoing statements to be admissible only when cross-examined or made under oath. *Id*. at 81-82. The only support for the majority opinion's purpose test, Justice Breyer pointed out, was an evidence treatise written in 1858, nearly 70 years after the founding. *Id*. at 67. The dissent interpreted Justice Souter's concurring opinion as indicating that if a "showing of domestic abuse is made this should be sufficient to call into play the protection of the forfeiture rule in a trial for murder of the domestic abuse victim. Doing 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.' " *Id*. at 87-88. Justice Breyer also stated that: "It is important to underscore that this case is premised on the assumption, not challenged here, that the witness' statements are testimonial for purposes of the Confrontation Clause…." See *Id*. at 48.

Arguments available to prosecutors in the wake of Giles

Based on the varied rationales given by the Justices for their opinions in *Giles*, what conclusions should prosecutors reach? What arguments should prosecutors make in advocating for the use of forfeiture by wrongdoing in their cases?

First, it appears that a number of Justices are open to revisiting *Crawford's* use and interpretation of testimonial statements analysis under the Confrontation Clause. The Chief Justice and Justice Alito were not on the Court when *Crawford* was decided. We cannot easily glean what the Chief Justice's views are concerning the parameters of testimonial statements analysis, but Justice Alito's concurring opinion in *Giles* represents a significant development. Justice Alito states, and his view appears to be in agreement with Justice Thomas' view, that testimonial statements should be defined more narrowly than *Crawford* defines them. For these two Justices, testimonial statements are limited to statements that have the formalized equivalents of the types of statements given at trial. See id. at 42-44. Justice Thomas states that in order for statements to be considered testimonial law enforcement must have engaged in "formalized dialogue" and there should be some suggestion the prosecution was attempting to introduce the out-of-court statements in order to evade the Confrontation Clause. *Id*. at 42-43. Both Justices flatly state that the statements in *Giles* should not be considered testimonial.

Since the majority opinion and the dissenting opinion also declined to hold that the statements in *Giles* were testimonial, but only "accepted" that the statements were such for purposes of doing further analysis, prosecutors should aggressively argue for a narrower definition of "testimonial" along the lines suggested by Justices Thomas and Alito, and not just in cases involving forfeiture by wrongdoing. It should be remembered that in *Crawford* the opinion addressed and specifically rejected this narrower interpretation of testimonial. See *Crawford*, 50-52. *Giles* signals that a number of Justices may now be open to possibly narrowing the definition of "testimonial." Revisiting the definition of "testimonial" is a positive development because it will allow prosecutors to challenge the underlying rationale and rule as stated in *Crawford*. Prosecutors should carefully advance cases which have the best facts supporting arguments for narrowing the definition of testimonial while having a good likelihood of being affirmed on appeal.

Second, given Justice Souter's concurring opinion, joined by Justice Ginsberg, and the two Justices who joined the dissenting opinion of Justice Breyer, prosecutors should always aggressively investigate for patterns of abuse, or repeated conduct, in both domestic and child abuse cases. As all experienced prosecutors know, domestic and child abuse cases usually are not one time isolated incidents. By definition such cases involve perpetrators who most often have a relationship with the victim. Most abused children are assaulted by persons who care for them or who live with them and so patterns of abuse should be able to be established in many cases. At least five Justices appear to be ready to adopt and use forfeiture by wrongdoing when a "continuing relationship" suggests that the acts resulting in forfeiture, i.e., murder, threats, intimidation or other acts, can be used to infer that the defendant had the intent "to isolate the victim from outside help, including the aid of law enforcement and the judicial process" indicating an intent to cause the witness to be unavailable to testify.

Although Justice Souter's language that it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed the victim is somewhat cryptic, he may be implying the "dynamics of abuse" can be used to infer the necessary intent for a finding of forfeiture by wrongdoing as required by the rest of the majority opinion. See *Giles*, at 47. One could call this "abuse-related intent" as opposed to a more rigid requirement of purpose or finding of a necessary specific intent in order to make the witness unavailable to testify. While Justice Scalia's opinion did not specifically endorse the language in Justice Souter's concurring opinion, he did not explicitly reject it either. Justice Scalia did refer to domestic abuse cases, however, he appears to add an important caveat to the concurring opinion of Justice Souter. The majority opinion agrees that:

> Acts of domestic violence are often intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal cases. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting the abuse…rendering her prior statements admissible under the forfeiture doctrine.

***Id.* at 41.**

Justice Scalia's language indicates that he might support the use of "abuse-related intent" in murder cases, but he may be limiting his support only to its use in murder cases. Given that the Chief Justice, and Justices Alito and Thomas joined the opinion in full (although Alito and Thomas also wrote concurring opinions), one can assume that they agree with Justice Scalia's caveat on "abuse-related intent." Accordingly, although some consider *Giles* to be a "win" for domestic abuse victims that will not be the case if "abuse-related intent" is limited to domestic violence murder cases. The vast majority of domestic abuse and child abuse victims are not murdered.

If prosecutors are going to prevent domestic and child murders and to have any ability to successfully reduce domestic violence in our country we will be unable to do so if "abuse-related intent" can only be used in murder cases. Justice Souter's concurring opinion does not appear to limit "abuse-related intent" to murder cases, but it is unclear if he would be willing to expand this concept beyond domestic abuse cases. A robust forfeiture by wrongdoing exception should not be limited to domestic abuse cases but should be available for use in all cases, e.g., child abuse by a stranger. Yet, the concurring opinions of both Justice Souter and Justices Thomas and Alito do soften the blow dealt to victims of domestic and child abuse by the majority opinion in *Giles*.

Third, prosecutors should continue to argue against the necessity of showing a "purpose" to make the witness unavailable to testify as opposed to an "intent" to make the witness unavailable. As the dissenting opinion points out, the requirement of showing a "purpose" as opposed to "intent" is highly questionable. See id. at 64-67. Showing a "purpose" sounds disturbingly similar to showing a "motive," and contrary to popular culture "motive" has never been an element a crime occurred. Because Justice Souter's concurring opinion does not appear to endorse the necessity of finding a purpose, as opposed to an intent, which can be reasonably inferred, prosecutors should argue no finding of a purpose to make the witness unavailable to testify is necessary if an intent to make the witness unavailable can be inferred.In addressing why purpose should not have to be shown the dissenting opinion mainly focuses on adult victims of domestic violence in addressing forfeiture by wrongdoing. *Id*. at 88-90. Child physical and sexual abuse cases usually are domestic abuse cases because the perpetrator is someone who lives with or cares for the child. In many gang slayings and organized crime cases relationships between witnesses and defendants have qualities that are similar to the "dynamics of abuse" that occur in domestic abuse cases. But that is not true in all cases. Accordingly, prosecutors should continue to argue for "abuse-related intent" as part of forfeiture by wrongdoing even when "dynamics of domestic abuse" are not present, e.g., the stranger rape of a child.

In child abuse cases, whether the perpetrator is a stranger or someone who knows the victim, the offender usually commits acts to isolate the victim and stop the victim from reporting the abuse. One could easily replace the words, "Acts of domestic violence" with the words "Acts of child abuse" in the majority opinion and the same reasoning would apply: "Acts of child abuse are often intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers, or cooperation in criminal cases." See id. at 41. Indeed, young children are targeted for physical and sexual assault because perpetrators know a child cannot resort to outside help. Children, on their own, are unable to give statements to police or cooperate in criminal cases.

Mandated reporting laws were passed because it is widely known that children are unable to report abuse on their own. See, e.g, Ben Matthews and Donald C. Bross, *Mandated Reporting is still a Policy with a reason: Empirical evidence and philosophical grounds*, 32 CHILD ABUSE AND NEGLECT 511-516 (2008). A defendant who chooses a child who is too young to testify should not be able to complain that he is unable to cross-examine the child at trial when he deliberately chose a victim he knows is too young to report the matter to the authorities on her own and when he chose the victim knowing the victim will probably be unavailable to testify at trial. See, e.g., Thomas D. Lyon and Raymond LaMagna, *A History of Children's Hearsay: From Old Bailey to Post-Davis*, 82 IND. L. J. 1029, 1058 (2007). Adult victims of domestic violence usually have the physical ability to go to police and are able to testify if they choose to do so. Young children are even more vulnerable because they do not have the physical ability to go to police and are often ruled incompetent to testify and thus have no opportunity to testify even if they could choose to do so. Prosecutors should argue that a showing of "abuse related intent" is all that is necessary in order for trial courts to allow the use of out-of-court statements in any type of forfeiture by wrongdoing case involving children.

Fourth, although the point may seem an academic one, prosecutors should not limit their arguments for the use of forfeiture by wrongdoing to an originalist analysis. Given the language in the dissents, and the acknowledgement in Justice Souter's concurring opinion that the dynamics of domestic abuse were not understood at the time of the Founders and the historical record does not address one way or the other the issues raised in *Giles* regarding the use of forfeiture by wrongdoing, Justice Scalia's interpretation of Confrontation Clause analysis now appears to be less persuasive to a majority of justices. It appears Justice Scalia's insistence that analysis of Confrontation Clause exceptions be based on discerning the "original meaning" as understood by the Founders may also no longer be accepted by a majority of the Court. This is a positive development for prosecutors and for domestic and child abuse victims. Justice Scalia's originalist methodology "straitjacketed" confrontation exceptions in a way that shortchanged children, women, and other crime victims. The era of the Founders was hostile to allowing women or children to testify against their abusers because both were considered the property of men.

Giles indicates that prosecutors must continue to argue for a robust forfeiture by wrongdoing doctrine. Although prosecutors must weigh "pushing the envelope" too far and thus risking a reversal against not aggressively arguing for a robust forfeiture doctrine and not aggressively arguing for a narrower definition of testimonial, in many cases if prosecutors do not push the envelope they will risk losing their cases before the jury. Successful prosecution of child abuse cases frequently occurs only when the child's out-of-court statements are admissible at trial. Accordingly, prosecutors must and should aggressively argue for admissibility of out-of-court statements and a robust forfeiture doctrine if we are to ensure that justice is done. Although the Court did not accept the argument that use of forfeiture should not require a showing of intent to make the witness unavailable to testify, the Court's opinion is a heavily fractured one and many opportunities exist to expand forfeiture doctrine and to "whittle down" the testimonial test as enunciated in *Crawford*.

Conclusion

The disparate rationales given by the Justices for their opinions in *Giles* leaves open a great many possibilities in handling cases of child abuse. In addition to continuing to use the doctrine of forfeiture by wrongdoing in these cases, the opinion now makes it possible to argue for a more narrow definition of testimonial. If so, the admission of child hearsay may more closely parallel practices prior to *Crawford*. The opinion also provides opportunities for prosecutors to argue for use of "abuse-related intent" in other cases where prosecutors wish to advocate for forfeiture by wrongdoing. NAPSAC's NCPTC is working on a more detailed and lengthy analysis of *Giles*, but until that article can be completed and distributed, please do not hesitate to call us if we can assist you in any way.

INSIDE the next issue

The November Issue of ***CenterPiece*** will feature an article entitled ***A Children's Courtroom Bill of Rights: Seven Pre-Trial Motions Prosecutors Should Routinely File in Cases of Child Maltreatment.*** This article, written by NCPTC Director Victor Vieth, will detail pre-trial motions prosecutors should file in cases of child abuses. If successful, these motions will assist children in handling the stress of testifying in court.

For More Information

The National Child Protection Training Center (NCPTC) at Winona State University is a training program of the National Association to Prevent Sexual Abuse of Children (NAPSAC). NCPTC provides training, technical assistance and publications to child protection professionals throughout the United States. In addition, NCPTC assists undergraduate and graduate programs seeking to improve the education provided to future child protection professionals. In partnership with CornerHouse, NCPTC also assists in the development and maintenance of forensic interview training programs utilizing the RATAC® forensic interviewing protocol. For further information, contact NCPTC at **507-457-2890** or visit our website at **www.ncptc.org.** For further information about NAPSAC, call **651-340-0537** or visit our website at **www.napsac.us.**