

## THE AFTERMATH OF *GILES V. CALIFORNIA*: ARE A KILLER'S PRIOR THREATS AGAINST HIS VICTIM ADMISSIBLE?

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Prior to her murder, Brenda Avie filed a domestic violence report, telling the police that ex-boyfriend, Dwayne Giles, had hit, choked and threatened to kill her while holding a knife to her neck. Three weeks after this report Giles shot and killed Brenda. At trial, Giles claimed he acted in self-defense. In response, the State introduced Brenda's prior statements to police regarding Giles' previous violence. The jury convicted Giles of first-degree murder. The California Supreme Court affirmed, ruling admission of the statements was permissible because Giles forfeited his Confrontation Clause rights by killing Brenda. In *Giles v. California*, 128 S.Ct. 2678 (2008), the Supreme Court, in a split 4-2-3 decision, overturned Giles' conviction, holding that the trial court's admission of the statements to police violated Giles' Sixth Amendment right to confront his accusers. Justice Scalia's majority opinion, which focused on the historical application of the forfeiture by wrongdoing exception to the Confrontation Clause, held that the doctrine applies only when a defendant murders a declarant (here Brenda) with the motive to make the declarant unavailable at trial. While this holding seemingly created an impossible hurdle for prosecutors, it is not the last word on the forfeiture by wrongdoing doctrine. In fact, the concurring and dissenting opinions in *Giles* reveal at least three possible arguments that the forfeiture by wrongdoing exception to the Confrontation Clause may still be applied in domestic violence cases.

Before analyzing the three arguments, an examination of the Justices' opinions is necessary.

Disagreement over whether motive to silence the victim or simply the intent to kill controls admissibility of evidence is the central difference between the six justice majority and the three justice dissent. The majority held that for victim statements about a prior threat to come into evidence in homicide cases it is not enough that the killing was intentional, rather there must be proof that the defendant's motive for the killing was to

make the witness unavailable to testify against him. Four Justices in the majority conclude that history supports such a motive requirement; two Justices in the majority said that while history was not clear regarding this requirement, equity required motive be proven. In contrast, the dissent rejected any motive requirement, urging that defendant's knowledge that killing a person would silence that person as a witness was sufficient to establish forfeiture by wrongdoing. The concurring and partly dissenting opinion by Justice Souter, joined by Justice Ginsberg, pointed out that history did not provide a clear answer to the specific issue of domestic violence in the forfeiture context. Instead, Souter focused on what equity would require. (Equity is relevant because the Court identified the forfeiture by wrongdoing exception to the Confrontation Clause as essentially equitable in nature.) Souter focused on the "near circularity" of a judge determining guilt by a preponderance of the evidence as a predicate to allowing the statements into evidence. The "near circularity" Souter discusses is that a judge determines pretrial that the accused killed the victim, then the prior statement about the threat is admitted as evidence for the jury to consider when determining if the accused is guilty of murder beyond a reasonable doubt. Thus, the accused is, in effect, judged guilty by the judge before the jury finds guilt beyond a reasonable doubt. Souter reasons that because of this "near circularity," there must be motive to achieve an equitable forfeiture by wrongdoing doctrine. For Souter, the motive requirement adds an element separate from the elements of the crime, thereby solving the circularity problem.

With this foundation, the three arguments that the forfeiture by wrongdoing exception to the Confrontation Clause may still be applied in domestic violence cases can now be turned to.

### 1. *Circularity is unavoidable.*

Justice Souter's circularity analysis provides the first argument that *Giles* may not preclude application of the forfeiture by wrongdoing exception in domestic violence cases. This is true because Souter's "solution" to the problem of circularity does not work

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### Practice Tip

Regularly consult Professor Richard D. Friedman's "The Confrontation Blog," <http://confrontationright.blogspot.com/>.<sup>1</sup>

in every instance and therefore the motive requirement is a superfluous element. For example, in many states, killing a person with the motive of silencing him or her as a witness is a death penalty offense. When the prosecutor opts to charge the aggravated offense of murder to silence, rather than un-aggravated murder, the judge is again faced with determining the existence of all the elements of the underlying crime (essentially defendant's guilt) in order to rule on admissibility of the threats; i.e. the circularity problem. Thus, to a significant extent, the presence or absence of circularity is controlled by the prosecutors' charging decision. Equity is therefore not achieved under Souter's reasoning, and is hardly a solid foundation for the requirement of motive in the forfeiture by wrongdoing doctrine.

**2. The motive to make a person unavailable is inherent in domestic violence.**

There are indications in all three opinions in *Giles* that motive would have readily been proven had the prosecutor revealed all the facts of prior threats and abuse in the trial court. In domestic violence cases, establishing a history of violence, threats, or intimidation is the same as proving motive to make the witness unavailable. As Justice Scalia points out:

Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. 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 stop her from reporting abuse to the authorities or cooperating with a criminal prosecution-rendering her prior statements admissible under the forfeiture doctrine.

*Id.* at 2693.

In a similar vein, Justice Souter opined that the historical material provides no reason to doubt that the element of intention [to make

the witness unavailable] would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger.

*Id.* at 2695.

Finally, the dissent's analysis, while focusing on intent and foreseeable consequences, is also consistent with the conclusion that motive need not be shown. Justice Breyer, joined by Justices Stevens and Kennedy, wrote that

murdering his ex-girlfriend would keep her from testifying; and that knowledge is sufficient to show the *intent* that law ordinarily demands. As this Court put the matter more than a century ago: A "man who performs an act which is known will produce a particular result is from our common experience presumed to have anticipated that result and to have intended it."

*Id.* at 2698 (emphasis in original) (internal citations omitted).

In sum, six Justices agree that what establishes motive in a domestic violence case is a history of violence, threats or intimidation. Thus, in these cases the Court's acknowledgment that a history of domestic violence may be sufficient proof of motive lessens the prosecution's burden. On re-trial, the prosecution can produce any evidence of a history of domestic violence relationship to establish motive.

**3. Because reports of domestic violence threats are not testimonial, defendant's Sixth Amendment rights are not implicated.**

Only testimonial statements are excluded by the Confrontation Clause, therefore, a third avenue to admit Brenda Avie's statements is to show her statements were non-testimonial. In an interesting

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**Practice Tip**  
Offer the history of domestic violence and abuse into evidence to establish motive.

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development, Justices Thomas and Alito wrote separate concurring opinions expressing doubt that Avie's statements to police regarding Giles' threats were testimonial.

**Practice Tip**

Argue that evidence sought to be admitted is non-testimonial.

The Court's present position on what statements qualify as testimonial is addressed in the companion cases *Davis v. Washington* and *Hammond v. Indiana*, 547 U.S. 813 (2006). In *Davis*, a seven to one majority held:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Id.* at 822.

In Justice Thomas' partial dissent in *Davis*, he objected to a measure of whether a statement is testimonial being based on the officer's purpose. In *Davis*, Justice Thomas correctly observed that the Court rarely uses the subjective intent of the police as a measure for decision-making, and viewed the Court's test as unworkable. Moreover, Justice Thomas identified the Confrontation Clause as seeking to prevent the evil wrought by the Marian Statutes. Thus, a statement that is testimonial requires "solemnity."

Affidavits, depositions, and prior testimony fit in this category; confessions, when extracted by police in a formal matter also qualify because they bear a striking resemblance to examinations of accused and accusers under the Marian Statutes. Mere conversations between police and witnesses, however, do not contain the required solemnity. *Id.* at 838. Such conversation, according to

Thomas should only be excluded where they are offered by the prosecution to avoid subjecting the declarant to cross-examination; in contrast if offered because a witness is

unavailable, the statements would be offered in good faith and would be admissible. *Id.*

Thomas reasserted his *Davis* position on testimonial statements to police in his concurring opinion in *Giles*. Referencing Thomas' reasoning in *Giles*, Justice Alito stated,

Like Justice Thomas, I am not convinced that the out of court statement at issue here fell within the Confrontation Clause in the first place. . . . The Confrontation Clause does not apply to out of court statements unless it can be said that they are the equivalent of statements made at trial by witnesses. . . . It is not at all clear that Ms. Avie's statement falls within that category.

*Giles*, 128 S.Ct. at 2694.

It is unclear whether Justice Alito thinks the statement by Brenda Avie is admissible under the majority test in *Davis* (the primary purpose test) or whether he is prepared to join Justice Thomas' view that the majority test is unworkable.

Ultimately, the *Giles* Court did not confront the testimonial nature of Brenda Avie's statement because the prosecution never raised it below. Justices Thomas' and Alito's concurrences appear to invite this argument on re-trial and may shed more light on how domestic violence cases can be prosecuted in the future.

**CONCLUSION**

*Giles* presented a narrow question, and the Court's decision raised as many or more questions than it answered. The split opinions reveal that the thread that held together the large majorities in *Crawford* and *Davis* appears to be unraveling and the Court's divergent views provide opportunity for challenges to *Giles* such that unavailable victims may still have the opportunity to be heard at trial. Stay tuned. ■

(Endnotes)

1 This blog is devoted to reporting and commenting on the Confrontation Clause in the aftermath of *Crawford v. Washington*, 541 U.S. 36 (2004).

2 Presenters will include national experts on the Confrontation Clause, including Thomas Davies (Tennessee), Jeffrey Fisher (Stanford), Richard Friedman (Michigan), Robert Kry (Firm of Baker Botts), Tom Lininger (Oregon), Robert Mosteller (Duke), and Deborah Tuerkheimer (Maine). For details – continue checking NCVLI's website – [www.ncvli.org](http://www.ncvli.org).

**Practice Tip**

Attend the January 30, 2009, Giles Symposium, hosted by Professor Doug Beloof of Lewis & Clark Law School in Portland, Oregon.<sup>2</sup>