

2009

# Down but Not out: Why *Giles* Leaves Forfeiture by Wrongdoing Still Standing

Marc McAllister

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

---

## Recommended Citation

Marc McAllister, *Down but Not out: Why Giles Leaves Forfeiture by Wrongdoing Still Standing*, 59 Case W. Res. L. Rev. 393 (2009)  
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol59/iss2/6>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

# DOWN BUT NOT OUT: WHY *GILES* LEAVES FORFEITURE BY WRONGDOING STILL STANDING

Marc McAllister<sup>†</sup>

*[The] detective's Holy Trinity . . . states that three things solve crimes:*

*Physical evidence.*

*Witnesses.*

*Confessions.*

*Without one of the first two elements, there is little chance that a detective will find a suspect capable of providing the third. A murder investigation, after all, is an endeavor limited by the very fact that the victim—unlike those who are robbed, raped or seriously assaulted—is no longer in a position to provide much information.<sup>1</sup>*

---

<sup>†</sup> Assistant Professor, Florida Coastal School of Law. The author received his J.D., *cum laude*, from the University of Notre Dame Law School, and clerked for Judge Charles Wilson of the Eleventh Circuit Court of Appeals. The author's previous publications include *Two-Way Video Trial Testimony and the Confrontation Clause: Fashioning a Better Craig Test in Light of Crawford*, 34 FLA. ST. U. L. REV. 835 (2007); *Judicial Review of Administrative Agency Action in Germany and the United States*, in 2006 ANNUAL OF GERMAN AND EUROPEAN LAW, Volume II/III (Berghahn Books); and *What the High Court Giveth the Lower Courts Taketh Away: How to Prevent Undue Scrutiny of Police Officer Motivations Without Eroding Randolph's Heightened Fourth Amendment Protections*, 56 CLEV. ST. L. REV. 663 (2008).

<sup>1</sup> DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 73 (Holt Paperbacks 2006) (1991).

INTRODUCTION .....	394
I. THE <i>GILES</i> OPINIONS.....	399
A. <i>Facts</i> .....	399
B. <i>California Court of Appeal Opinion</i> .....	401
C. <i>California Supreme Court Opinion</i> .....	403
D. <i>United States Supreme Court Opinion</i> .....	405
1. <i>Majority Opinion</i> .....	405
2. <i>First Concurring Opinion—Justice Thomas</i> .....	409
3. <i>Second Concurring Opinion—Justice Alito</i> .....	410
4. <i>Final Concurring Opinion—Justices Souter and Ginsburg</i> .....	410
5. <i>Dissent—Justices Breyer, Stevens, and Kennedy</i> .....	411
II. WHY <i>GILES</i> WILL BE NARROWLY CONSTRUED .....	416
III. THE POTENTIAL NARROWING OF <i>GILES</i> .....	425
A. <i>Evading Giles through Proof of the Requisite Intent</i> .....	426
1. <i>Lowering Burden of Proof</i> .....	426
2. <i>Inferring Intent</i> .....	431
3. <i>Transferring Intent</i> .....	433
4. <i>Shifting Burden of Proof to Party Asserting Confrontation Right</i> .....	434
5. <i>Using the Challenged Hearsay to Prove Forfeiture</i> ....	436
6. <i>Partial Intent Sufficient</i> .....	436
B. <i>Broadening the Scope of Non-Testimonial Hearsay</i> .....	437
CONCLUSION .....	443

## INTRODUCTION

The forfeiture by wrongdoing doctrine (“forfeiture”) is an equitable doctrine<sup>2</sup> with deep historical roots.<sup>3</sup> The forfeiture doctrine prevents an individual accused of criminal activity from invoking legal protections created by his wrongful acts.<sup>4</sup> Being an equitable doctrine, this rule is grounded “in the maxim that no one shall be

---

<sup>2</sup> See *People v. Giles*, 19 Cal. Rptr. 3d 843, 848 (Cal. Ct. App. 2004) (“Forfeiture [by wrongdoing] is a logical extension of the equitable principle that no person should benefit from his own wrongful acts.”), *aff’d*, 152 P.3d 433 (Cal. 2007), *cert. granted*, 128 S. Ct. 976 (2008), *vacated*, 128 S. Ct. 2678 (2008); see also *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982) (analogizing the principle underlying forfeiture by wrongdoing to the “equitable doctrine of ‘clean hands,’” in that both prevent a party from deriving any benefit from his or her own wrongdoing).

<sup>3</sup> See *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232–33 (1959) (“To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts . . . .”); *Ridgeway’s Case*, (1594) 76 Eng. Rep. 753, 755 (K.B.) (indicating that forfeiture has been part of English law since the sixteenth century).

<sup>4</sup> See *Reynolds v. United States*, 98 U.S. 145, 158 (1878).

permitted to take advantage of his own wrong.”<sup>5</sup> In two recent cases, *Crawford v. Washington*<sup>6</sup> and *Davis v. Washington*,<sup>7</sup> the United States Supreme Court reaffirmed forfeiture as one of two core exceptions to the right of a criminal defendant to confront his accusers.<sup>8</sup> When this exception applies, a criminal defendant may not assert his right to confront an unavailable witness when the defendant has wrongfully procured the witness’s absence.

An integral part of the Sixth Amendment,<sup>9</sup> the right of a criminal defendant to confront his accusers is fundamental to our system of justice.<sup>10</sup> While the constitutional right of confrontation has been said to serve various purposes,<sup>11</sup> today it essentially guarantees a criminal defendant the right to cross-examine those who testify against him.<sup>12</sup>

---

<sup>5</sup> *Id.* at 159. See also *State v. Alvarez-Lopez*, 98 P.3d 699, 705 (N.M. 2004) (“One of the primary purposes of the forfeiture by wrongdoing rule is ‘to deter criminals from intimidating or ‘taking care of’ potential witnesses.’” (quoting *United States v. Thompson*, 286 F.3d 950, 962 (7th Cir. 2002))).

<sup>6</sup> 541 U.S. 36 (2004).

<sup>7</sup> 547 U.S. 813, 833–34 (2006) (“The *Roberts* approach to the Confrontation Clause undoubtedly made recourse to th[e] forfeiture doctrine less necessary, because prosecutors could show the ‘reliability’ of *ex parte* statements more easily than they could show the defendant’s procurement of the witness’s absence. *Crawford*, in overruling *Roberts*, did not destroy the ability of courts to protect the integrity of their proceedings.”). *Davis* was decided together with *Hammon v. Indiana* on certiorari to the Supreme Court of Indiana. *Id.* at 813.

<sup>8</sup> *Crawford*, 541 U.S. at 62. The *Crawford* Court noted, “the ‘right . . . to be confronted with the witnesses against him,’ is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.” *Id.* at 54 (quoting U.S. CONST. amend. VI) (omission in original) (citation omitted). Forfeiture by wrongdoing is one of these exceptions as it is a founding era doctrine. See *id.* at 62 (ratifying the rule of forfeiture by wrongdoing, and noting that the rule “extinguishes confrontation claims on essentially equitable grounds”).

<sup>9</sup> The Sixth Amendment assures the right of an accused “to be confronted with the witnesses against him.” U.S. CONST. amend. VI.

<sup>10</sup> The primary right advanced by the Clause—the right of cross-examination—has been deemed “the ‘greatest legal engine ever invented for the discovery of truth.’” *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (quoting *California v. Green*, 399 U.S. 149, 158 (1970)); see also *People v. Geraci*, 649 N.E.2d 817, 822 (N.Y. 1995) (noting the societal significance of the right of confrontation, and “the intimate association between the right to confrontation and the accuracy of the fact-finding process” (quoting *United States v. Thevis*, 665 F.2d 616, 631 (5th Cir. Unit B 1982))).

<sup>11</sup> See *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (“The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination.” (citing *Delaware v. Fensterer*, 474 U.S. 15, 18–19 (1985) (per curiam))); see also *Mattox v. United States*, 156 U.S. 237, 242–43 (1895) (“The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may . . . judge . . . whether he is worthy of belief.”).

<sup>12</sup> See *State v. Webb*, 2 N.C. (1 Hayw.) 103, 104 (Sup. L. & Eq. 1794) (per curiam) (recognizing that the confrontation right ensures that no criminal defendant “be prejudiced by evidence which he had not the liberty to cross examine”); see also *Crawford*, 541 U.S. at 55–56 (“We do not read the historical sources to say that a prior opportunity to cross-examine was

Like the forfeiture doctrine, the confrontation right has deep equitable roots.<sup>13</sup> Indeed, a case decided just three years after the Sixth Amendment's adoption described the confrontation right as one "founded on natural justice."<sup>14</sup>

Throughout our nation's history, courts have held that a defendant's right of confrontation must sometimes yield due to forfeiture,<sup>15</sup> effectively admitting an absent witness's statements into evidence despite the lack of opportunity for cross-examination. In certain instances of wrongdoing, forfeiture easily trumps the defendant's confrontation right. For example, when a criminal defendant has bribed or intimidated a witness with the intent of preventing the witness from testifying, the defendant is unable to invoke his right to cross-examine that witness.<sup>16</sup> But unlike the bribery context, where the briber's very actions signal an intent to prevent trial testimony, not all "wrongful acts" that have the effect of preventing a witness from testifying should necessarily trigger the forfeiture exception. For example, a defendant who negligently and unknowingly collides into a witness's automobile the evening before trial, causing her to miss her scheduled testimony, would not forfeit his confrontation right.<sup>17</sup> 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.

---

merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability."); *Tennessee v. Street*, 471 U.S. 409, 414 (1985) ("The Clause's fundamental role i[s] protecting the right of cross-examination . . .").

<sup>13</sup> See *Crawford*, 541 U.S. at 43-46 (noting that the confrontation right dates back to Roman times and was an established part of English common law by the seventeenth century).

<sup>14</sup> *Webb*, 2 N.C. (1 Hayw.) at 104.

<sup>15</sup> See, e.g., *United States v. Carlson*, 547 F.2d 1346, 1360 (8th Cir. 1976) (holding the defendant waived his right to confrontation when he intimidated a witness into not testifying at trial); see also *Mattox*, 156 U.S. at 243 ("[G]eneral rules of law of this kind . . . must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."); *Reynolds v. United States*, 98 U.S. 145, 158 (1878) (stating that the Constitution "grants [the accused] the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege").

<sup>16</sup> See *Giles v. California*, 128 S. Ct. 2678, 2691 (2008) ("The common-law forfeiture rule was aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them . . .").

<sup>17</sup> See *People v. Giles*, 19 Cal. Rptr. 3d 843, 850 (Cal. Ct. App. 2004) (providing a similar example), *aff'd*, 152 P.3d 433 (Cal. 2007), *cert. granted*, 128 S. Ct. 976 (2008), *vacated*, 128 S. Ct. 2678 (2008).

Between 2004 and 2008, lower courts struggled<sup>18</sup> to resolve whether the forfeiture exception required wrongdoing *specifically intended* to prevent testimony against the accused. Being an equitable doctrine, and given the Court's broad endorsements of the doctrine in both *Crawford*<sup>19</sup> and *Davis*,<sup>20</sup> many courts erred on the side of evidence admission.<sup>21</sup> With a line of cases on both sides,<sup>22</sup> the Supreme Court in *Giles v. California*<sup>23</sup> sought to resolve this issue.

In *Giles*, the defendant argued that his confrontation rights were violated when the court admitted out-of-court statements made by his shooting victim several weeks prior to her death. The victim's challenged statements demonstrated Giles's tendency for violence towards her, thereby casting doubt on his claim of self-defense.<sup>24</sup> Despite Giles's confrontation objection, the trial court admitted the evidence, and Giles was convicted of first-degree murder.<sup>25</sup>

---

<sup>18</sup> See, e.g., *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 of an] intent requirement . . ."), *aff'd*, 156 P.3d 694 (N.M. 2007).

<sup>19</sup> *Crawford*, 541 U.S. at 62 ("[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds.")

<sup>20</sup> 547 U.S. 813, 833 (2006) ("[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. While 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. 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." (citation omitted) (second omission in original)).

<sup>21</sup> See *People v. Giles*, 152 P.3d 433, 442–44 (Cal. 2007) (citing numerous cases adopting this approach), *cert. granted*, 128 S. Ct. 976 (2008), *vacated*, 128 S. Ct. 2678 (2008).

<sup>22</sup> The following cases, among others, explicitly rejected the rule that a defendant must have intended to prevent the witness from testifying for the forfeiture doctrine to apply: *United States v. Garcia-Meza*, 403 F.3d 364, 370–71 (6th Cir. 2005) (applying forfeiture doctrine in murder case with facts similar to *People v. Giles*); *United States v. Mayhew*, 380 F. Supp. 2d 961 (S.D. Ohio 2005) (applying forfeiture doctrine to admit statements of dying victim in murder case); *People v. Moore*, 117 P.3d 1, 2–3 (Colo. Ct. App. 2004) (applying forfeiture doctrine in murder case); *State v. Meeks*, 88 P.3d 789 (Kan. 2004) (applying forfeiture doctrine to facts similar to those in *Mayhew*), *overruled in part* by *State v. Davis*, 158 P.3d 317 (Kan. 2006); *State v. Jensen*, 727 N.W.2d 518, 534 (Wis. 2007) (applying forfeiture doctrine in murder case and citing *Garcia-Meza*). On the other hand, the following cases endorsed the intent requirement later adopted by the U.S. Supreme Court in *Giles*: *People v. Moreno*, 160 P.3d 242 (Colo. 2007) (for forfeiture to apply, defendant's "wrongful conduct must . . . be designed, at least in part, to subvert the criminal justice system by depriving that system of the evidence upon which it depends"); *Commonwealth v. Edwards*, 830 N.E.2d 158, 170 (Mass. 2005) (ruling forfeiture applicable where "defendant acted with the intent to procure the witness's unavailability"); *State v. Romero*, 133 P.3d 842, 855–56 (N.M. Ct. App. 2006) (requiring intent-to-silence to invoke the forfeiture doctrine, and rejecting the state's argument that the requisite intent can be inferred), *aff'd*, 156 P.3d 694 (N.M. 2007).

<sup>23</sup> 128 S. Ct. 2678 (2008).

<sup>24</sup> See *People v. Giles*, 19 Cal. Rptr. 3d 843, 846 (Cal. Ct. App. 2004), *aff'd*, 152 P.3d 433 (Cal. 2007), *cert. granted*, 128 S. Ct. 976 (2008), *vacated*, 128 S. Ct. 2678 (2008).

<sup>25</sup> Respondent's Brief on the Merits at 3, *Giles v. California*, 128 S. Ct. 2678 (2008) (No.

On appeal in a post-*Crawford* world,<sup>26</sup> the State sought to invoke the forfeiture exception, arguing that the doctrine applies in *all cases* of misconduct rendering a witness unavailable to testify, regardless of intent.<sup>27</sup> Both the California Court of Appeal<sup>28</sup> and the California Supreme Court endorsed the State's view.<sup>29</sup> In a decision that significantly limited the scope of the forfeiture exception, the United States Supreme Court reversed, ruling that the accused must have intended to silence the would-be witness before forfeiture would apply.<sup>30</sup>

Despite its ruling, the *Giles* Court was severely divided. Although the Court's primary aim was to apply the forfeiture exception as it existed at the time of our nation's founding,<sup>31</sup> five of the nine Justices ultimately deemed the historical record unable to resolve the particular intent issue, and four expressed concern with the overall case outcome.

Given the flaws inherent in the *Giles* rule,<sup>32</sup> future courts will likely circumvent *Giles* to prevent criminals from benefiting by their wrongdoing. Before examining the basis for this claim, Part I of this Article summarizes the facts of *Giles*, the state court opinions, and the various opinions authored by the Supreme Court Justices. Part II demonstrates why the concerns of the *Giles* dissenters are valid and will trickle down to post-*Giles* decisions. With courts now unable to apply the forfeiture doctrine in future cases where the equities demand it but where obvious intent

---

07-6053), 2008 WL 904073.

<sup>26</sup> In 2004, as the *Giles* case moved from trial to initial appeal, the Supreme Court established a new framework of Confrontation Clause jurisprudence in *Crawford*, holding that an out-of-court, testimonial statement is inadmissible under the Confrontation Clause unless the witness is both unavailable and the defendant had a prior opportunity to cross-examine the witness. *See Crawford v. Washington*, 541 U.S. 36, 61 (2004) ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to . . . amorphous notions of 'reliability.'"); *see also* Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1022 (1998) ("The reliability determination [under *Roberts*] threatens to become a shadow of the trial on the merits—a battle over the ultimate factual issues at stake in the prosecution, based on all the evidence presented at trial.").

<sup>27</sup> *See Giles*, 19 Cal. Rptr. 3d at 848.

<sup>28</sup> *Id.* at 851.

<sup>29</sup> *See People v. Giles*, 152 P.3d 443, 443 (Cal. 2007), *cert. granted*, 128 S. Ct. 976 (2008), *vacated*, 128 S. Ct. 2678 (2008).

<sup>30</sup> *Giles v. California*, 128 S. Ct. 2678, 2693 (2008).

<sup>31</sup> All nine Justices agreed that the common-law doctrine permitted the introduction of out-of-court statements "of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant." *Id.* at 2683; *see also id.* at 2695–96 (Breyer, J., dissenting). Interpreting cases from the founding era, the majority concluded that this language—and hence the doctrine as it existed at common law—applied only when the defendant engaged in conduct *specifically designed* to prevent the witness from testifying. *Id.* at 2687–88 (majority opinion).

<sup>32</sup> *See* discussion *infra* Part II.

evidence<sup>33</sup> is lacking, Part III examines the two primary methods by which lower courts will avoid *Giles*'s grasp, thereby achieving what many jurists will deem a more equitable result. This Part contends that courts will evade *Giles* by easing the burden of proving its requisite intent, and by broadening the definition of "non-testimonial," thereby removing the disputed evidence from *Crawford*'s reach.

## I. THE *GILES* OPINIONS

### A. Facts

In *Giles*, the defendant argued his confrontation rights were violated when the court admitted out-of-court statements made by his shooting victim prior to her death. *Giles*'s victim, Brenda Avie, had dated *Giles* for several years.<sup>34</sup> A few weeks prior to her death, officers investigated a report involving *Giles* and Avie.<sup>35</sup> According to one of those officers, Stephen Kotsinadelis, the incident began when *Giles* became angry and accused Avie of having an affair.<sup>36</sup> According to the officer, *Giles* grabbed Avie by the shirt, lifted her off the floor, and choked her. *Giles* then allegedly climbed on top of Avie, punched her in the face, and held a knife to Avie while threatening to kill her.<sup>37</sup> Avie's description of these events later formed the core of the forfeiture dispute at trial.<sup>38</sup>

A few weeks after this event, *Giles* was at his grandmother's house with his new girlfriend, Tameta Munks.<sup>39</sup> After Munks left, Avie arrived.<sup>40</sup> Family members inside the home heard *Giles* and Avie speaking to one another outside.<sup>41</sup> A series of gunshots then rang out.<sup>42</sup> *Giles*'s grandmother ran outside and discovered *Giles* standing

---

<sup>33</sup> By "obvious intent evidence," I mean the type of intent inherent in relatively clear-cut cases of witness tampering, such as that found in bribery cases or in the type of case cited by the dissent in *Giles*. See *Giles*, 128 S. Ct. at 2703 (Breyer, J., dissenting) ("Where that motive is certain, for example where the defendant knows the witness only because she has previously testified against him, the prior statements would be admitted under the majority's purpose rule and the question of intent would not [be disputed].").

<sup>34</sup> *People v. Giles*, 19 Cal. Rptr. 3d 843, 845 (Cal. Ct. App. 2004), *aff'd*, 152 P.3d 433 (Cal. 2007), *cert. granted*, 128 S. Ct. 976 (2008), *vacated*, 128 S. Ct. 2678 (2008).

<sup>35</sup> *Id.* at 846.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 846-47.

<sup>39</sup> *Id.* at 845.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*



near Avie, gun in hand.<sup>43</sup> Giles then fled the scene, and was arrested over two weeks later.<sup>44</sup>

Upon investigation, police discovered that Avie had been shot six times in the torso.<sup>45</sup> One wound was consistent with her holding up her hand at the time she was shot, and one suggested she was shot while lying on the ground.<sup>46</sup> Police also discovered that Giles's weapon fired one bullet at a time, indicating that Giles had pulled the trigger six times.<sup>47</sup> Finally, police confirmed that Avie was not carrying a weapon at the time of her shooting.<sup>48</sup>

At trial, Giles admitted the shooting, rendering moot the question of whether his "wrongdoing" prevented her cross-examination.<sup>49</sup> Having admitted the shooting, Giles placed his eggs in the basket of self-defense.<sup>50</sup> In support of this defense, Giles testified and portrayed Avie as a violent woman.<sup>51</sup> Giles claimed that Avie had shot another man before she met him, and that he had observed her threaten people with a knife.<sup>52</sup> According to Giles, when Avie arrived at his grandmother's house, Avie threatened to kill him and Munks.<sup>53</sup> At this point, Giles claims to have retrieved a gun stowed under a couch in the garage.<sup>54</sup> According to Giles, Avie charged toward him, and he reacted by firing several shots.<sup>55</sup> Giles claimed his eyes were closed as he was firing the gun, and that he did not intend to kill.<sup>56</sup>

Over Giles's objection, Officer Kotsinadelis testified regarding the domestic incident prior to Avie's death.<sup>57</sup> The court admitted these statements under a California hearsay exception (a ruling which was permissible at the time under *Ohio v. Roberts*, but would later not be under *Crawford*).<sup>58</sup> With Avie's statements significantly undermining

---

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 845.

<sup>45</sup> *Id.*

<sup>46</sup> *People v. Giles*, 152 P.3d 433, 436 (Cal. 2007), *cert. granted*, 128 S. Ct. 976 (2008), *vacated*, 128 S. Ct. 2678 (2008).

<sup>47</sup> Respondent's Brief on the Merits, *supra* note 25, at 3.

<sup>48</sup> *Id.* at 1.

<sup>49</sup> *Id.* at 2.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *People v. Giles*, 19 Cal. Rptr. 3d 843, 846 (Cal. Ct. App. 2004), *aff'd*, 152 P.3d 433 (Cal. 2007), *cert. granted*, 128 S. Ct. 976 (2008), *vacated*, 128 S. Ct. 2678 (2008).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> The trial judge deemed the testimony admissible hearsay under California Evidence Code § 1370, which permits admission of out-of-court statements describing the infliction or threat of physical injury on a declarant when the declarant is unavailable to testify at trial and the prior statements are deemed trustworthy. Respondent's Brief on the Merits, *supra* note 25, at

Giles's self-defense claim,<sup>59</sup> the jury found Giles guilty of first-degree murder and imposed a sentence of fifty years to life.<sup>60</sup>

### B. California Court of Appeal Opinion

As *Giles* awaited initial appeal, the Supreme Court established its new Confrontation Clause jurisprudence in *Crawford*, holding that an out-of-court, testimonial statement is inadmissible at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine her.<sup>61</sup> In replacing the open-ended "reliability" test of *Ohio v. Roberts*<sup>62</sup> with a rigid cross-examination requirement, *Crawford* expanded the Sixth Amendment's protections and prevented introduction of hearsay admissible under the old regime.<sup>63</sup>

Citing *Crawford*, Giles argued on appeal that admission of Avie's out-of-court statements violated his confrontation right.<sup>64</sup> The Court of Appeal disagreed, ruling instead that Giles forfeited his confrontation right through his wrongdoing.<sup>65</sup> In language later fleshed out by the United States Supreme Court, the Court of Appeal highlighted the following passage from *Reynolds v. United States*,<sup>66</sup> the Supreme Court's first major forfeiture decision:

"The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by . . . [the accused's] *wrongful procurement*, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away."<sup>67</sup>

---

2.

<sup>59</sup> *Giles*, 19 Cal. Rptr. 3d at 846.

<sup>60</sup> Respondent's Brief on the Merits, *supra* note 25, at 3.

<sup>61</sup> *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

<sup>62</sup> 448 U.S. 56 (1980), *abrogated by* *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>63</sup> The pre-*Crawford* rule of *Ohio v. Roberts* allowed admission of unconfrosted, out-of-court statements when those statements either fell within a "firmly rooted hearsay exception," or were otherwise considered "reliable." *Id.* at 66. Over time, this standard proved vague and amorphous, and actually revived the core concern the Confrontation Clause was meant to eradicate, the so-called "trial by affidavit." *See, e.g., Mattox v. United States*, 156 U.S. 237, 242-43 (1895) ("The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness.").

<sup>64</sup> *Giles*, 19 Cal. Rptr. 3d at 846-47.

<sup>65</sup> *Id.* at 847. The court noted that *Crawford* had specifically recognized and accepted forfeiture by wrongdoing as an exception to its rule that confrontation is required before testimonial hearsay may be admitted. *Id.* (citing *Crawford*, 541 U.S. at 61-62).

<sup>66</sup> 98 U.S. 145 (1878).

<sup>67</sup> *Giles*, 19 Cal. Rptr. 3d at 848 (quoting *Reynolds v. United States*, 98 U.S. 145, 158

Interpreting this crucial passage, Giles argued that a defendant forfeits his Confrontation Clause objection only when, after being charged with a crime, he wrongfully procures the witness's absence from trial *with the specific intent* to prevent testimony *about that crime*.<sup>68</sup> According to Giles, because he had not been charged with a crime at the time of Avie's shooting, forfeiture should not apply.<sup>69</sup> The court again disagreed, reasoning:

Forfeiture is a logical extension of the equitable principle that no person should benefit from his own wrongful acts. A defendant whose intentional criminal act renders a witness unavailable for trial benefits from his crime if he can use the witness's unavailability to exclude damaging hearsay statements by the witness that would otherwise be admissible. *This is so whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable.* Other courts have applied forfeiture in [similar] cases . . . .<sup>70</sup>

Giles next argued that to apply forfeiture here, the court must effectively deem the defendant guilty of the very crime for which he is on trial (as this is the same act allegedly rendering the witness unavailable).<sup>71</sup> According to Giles, such a ruling impermissibly requires the court to assume guilt before guilt is established.<sup>72</sup> Rejecting this argument, the court reasoned that judges often make evidentiary rulings that coincide with an ultimate issue in the case.<sup>73</sup> As an example, the court noted that qualifying hearsay statements by co-conspirators are often admissible against a defendant charged with conspiracy, even though the very existence of the alleged conspiracy must be proved before the statement is admitted.<sup>74</sup>

Turning to the merits, the court found sufficient evidence that Giles had "procured Avie's unavailability through criminal

---

(1878)) (alteration in original) (emphasis added).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (citing *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999) (applying forfeiture doctrine in a murder case); *United States v. Miller*, 116 F.3d 641 (2d Cir. 1997) (same); *People v. Moore*, 117 P.3d 1, 2-3 (Colo. Ct. App. 2004) (also applying forfeiture doctrine in a murder case); *State v. Meeks*, 88 P.3d 789 (Kan. 2004) (same)) (emphasis added).

<sup>71</sup> *Id.* at 849.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

conduct”—here, through criminal homicide.<sup>75</sup> Before closing, the court clarified that its rule would only apply upon proof of an “*intentional* criminal act”; according to the court, “it is not enough to commit some act that *incidentally* produces that result.”<sup>76</sup> The court explained its position along the intent continuum with the following illustration:

In this case, for example, Avie was killed because appellant intentionally fired a gun at her; it is perfectly appropriate to conclude that in doing so, he forfeited his right to confront her . . . . By contrast, if Avie had instead been killed in an unintentional automobile collision while appellant was driving, he would have been the technical cause of her unavailability at any future trial, but his actions could not be construed as a forfeiture of his right to confront her as a witness.<sup>77</sup>

Thus, according to this court, a general criminal intent would be enough to trigger the forfeiture exception, as opposed to the more specific intent suggested by the defendant. When combined with the doctrine that one presumably intends the natural and probable consequences of his actions,<sup>78</sup> this notion of intent essentially views all intentional killings as incorporating the additional intent to render the witness unavailable.<sup>79</sup>

### C. California Supreme Court Opinion

In affirming the Court of Appeal’s ruling,<sup>80</sup> the California Supreme Court first noted *Crawford’s* explicit affirmation of the forfeiture doctrine.<sup>81</sup> The court observed that neither *Reynolds*<sup>82</sup> nor the lower

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 850 (emphasis added).

<sup>77</sup> *Id.* at 850–51.

<sup>78</sup> *See, e.g.,* *People v. Conley*, 543 N.E.2d 138, 143 (Ill. App. Ct. 1989) (“Although the State must establish the specific intent [required by the statute], problems of proof are alleviated [by] the ordinary presumption that one intends the natural and probable consequences of his actions.”).

<sup>79</sup> *See* *Giles v. California*, 128 S. Ct. 2678, 2698 (2008) (Breyer, J., dissenting).

<sup>80</sup> *People v. Giles*, 152 P.3d 433, 435 (Cal. 2007), *cert. granted*, 128 S. Ct. 976 (2008), *vacated*, 128 S. Ct. 2678 (2008). The California Supreme Court began its review by phrasing the issue as follows: “Did defendant forfeit his right to confront his ex-girlfriend about the prior incident of domestic violence by killing her and thus making it impossible for her to be at the murder trial?” *Id.* The court also asked, “Does the doctrine of ‘forfeiture by wrongdoing’ apply where the alleged ‘wrongdoing’ is the same as the offense for which defendant was on trial?” *Id.* The court focused primarily on the first issue, and easily dispensed with the latter one. *See id.* at 444–45.

<sup>81</sup> *Id.* at 437–38.

courts had adequately resolved the precise intent issue.<sup>83</sup> Accordingly, the court turned to the doctrine's equitable nature to resolve this issue.

Focusing on the equities, the court noted the "broad equitable principles"<sup>84</sup> underlying forfeiture, and cited numerous decisions highlighting the equitable outcome the rule produces.<sup>85</sup> According to the court, excluding the disputed statements here would unfairly tilt the scales of justice. The court declared:

[P]artially through the victim's own alleged statements, defendant portrayed [his victim] as a violent, aggressive, foulmouthed, jealous, and volatile person.

Defendant now argues that admission of the victim's extrajudicial statements to the police, which conflicted with his portrayal of the victim as the aggressor, violated his confrontation rights. Defendant should not be able to take advantage of his own wrong by using the victim's statements to bolster his self-defense theory, while capitalizing on her unavailability and asserting his confrontation rights to prevent the prosecution from using her conflicting statements.<sup>86</sup>

Highlighting the need to create a level evidentiary playing field, the court rejected Giles's specific intent argument.<sup>87</sup> The court then concluded its opinion by suggesting limitations upon its rule. According to the court, there must be a showing of "genuine[]" unavailability caused by the defendant's "intentional criminal act."<sup>88</sup> Further, the state must prove the wrongdoing by a "preponderance of the evidence,"<sup>89</sup> and that proof must be corroborated by "independent . . . evidence" beyond the unavailable declarant's hearsay.<sup>90</sup>

---

<sup>82</sup> See *id.* at 438 n.3.

<sup>83</sup> See *id.* at 439-42.

<sup>84</sup> *Id.* at 442.

<sup>85</sup> See *id.* at 442-43.

<sup>86</sup> *Id.* at 444.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 446.

<sup>89</sup> *Id.* But see *id.* at 447-48 (Werdegar, J., concurring) (criticizing the majority for ruling on this particular issue when the issue was not squarely before the court and was not adequately briefed by the parties).

<sup>90</sup> *Id.* at 446 (majority opinion). But see *id.* at 447-48 (Werdegar, J., concurring) (again criticizing the majority for addressing this particular issue when the issue was not squarely before the court).

### D. United States Supreme Court Opinion<sup>91</sup>

Before reviewing the various opinions in *Giles*, it is helpful to understand the breakdown of votes. The majority opinion, written by Justice Scalia, was also signed by Chief Justice Roberts and Justices Thomas and Alito; Justices Souter and Ginsburg joined all but Part II-D-2 of the majority opinion,<sup>92</sup> which essentially responds to arguments raised by the dissent.

Justices Thomas, Alito, and Souter (joined by Justice Ginsburg) each drafted concurring opinions.<sup>93</sup> Notably, Justices Thomas and Alito both expressed doubt as to whether the statements in *Giles* were actually “testimonial.”<sup>94</sup> Had the “testimonial” issue been properly preserved for appeal, it is likely<sup>95</sup> that a majority of Justices would have found the Confrontation Clause not offended by admission of Avie’s statements.<sup>96</sup>

Justice Breyer dissented, and was joined by Justices Stevens and Kennedy.<sup>97</sup>

#### 1. Majority Opinion

The majority began its review by characterizing *Crawford* as permitting exceptions to the Confrontation Clause “in cases where an exception to the confrontation right was recognized at the time of the founding.”<sup>98</sup> As in *Crawford* and *Davis*, the Court quickly concluded that forfeiture was indeed a common law exception to the right of confrontation.<sup>99</sup>

Turning to Part II, the Court considered whether the specific forfeiture theory endorsed by the California courts accurately depicted the “founding-era exception.”<sup>100</sup> In Part II-A, citing *Lord*

---

<sup>91</sup> *Giles v. California*, 128 S. Ct. 2678 (2008).

<sup>92</sup> *Id.* at 2680–81.

<sup>93</sup> *See id.* at 2693–94 (Thomas, J., concurring); *id.* at 2694 (Alito, J., concurring); *id.* at 2694–95 (Souter, J., concurring in part).

<sup>94</sup> *See id.* at 2693–94 (Thomas, J., concurring); *id.* at 2694 (Alito, J., concurring).

<sup>95</sup> It is unclear how the dissenting Justices would have ruled on this precise issue. On this question, the dissent merely states: “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. With that understanding, we ask whether the defendant, through his wrongdoing, has forfeited his Confrontation Clause right.” *Id.* at 2695 (Breyer, J., dissenting).

<sup>96</sup> *See Davis v. Washington*, 547 U.S. 813, 823–26 (2006) (answering affirmatively the question of “whether the Confrontation Clause applies only to testimonial hearsay”).

<sup>97</sup> *Giles*, 128 S. Ct. at 2695–709 (Breyer, J., dissenting).

<sup>98</sup> *Id.* at 2682 (majority opinion).

<sup>99</sup> *Id.* at 2683.

<sup>100</sup> *Id.* at 2682. Notably, the majority and the dissent each narrowed the issue to this question, but they disagreed on the historical interpretation. *See id.*; *id.* at 2695–96 (Breyer, J., dissenting).

*Morley's Case*<sup>101</sup> and similar decisions from the seventeenth to nineteenth centuries, the Court characterized the common law forfeiture doctrine as “permitt[ing] the introduction of statements of a witness who was ‘detained’ or ‘kept away’ by the ‘means or procurement’ of the defendant.”<sup>102</sup> Employing a textual interpretation, the Court interpreted these terms to “suggest that the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying.”<sup>103</sup> Citing an 1828 edition of Webster’s Dictionary,<sup>104</sup> the Court admitted that “there are definitions of ‘procure’ and ‘procurement’ that would merely require that a defendant have caused the witness’s absence” regardless of intent, but noted that “other definitions would limit the causality to one that was *designed* to bring about the result ‘procured.’”<sup>105</sup> Ultimately, the Court concluded that cases and treatises from the founding era adopted a purpose-based definition of the governing terms.<sup>106</sup>

According to the Court, founding-era cases found prior testimony admissible when the witness “was kept away by the defendant’s ‘means and contrivance.’”<sup>107</sup> In the Court’s view, “[t]his phrase requires that the defendant have schemed to bring about the absence from trial that he ‘contrived.’”<sup>108</sup> The Court pointed to an 1858 treatise that made the purpose requirement explicit by declaring the forfeiture rule applicable when a witness “‘had been kept out of the way by the prisoner . . . *in order to prevent him from giving evidence against him.*””<sup>109</sup> According to the Court, founding-era courts applied the exception in a manner consistent with this definition.<sup>110</sup>

The Court devoted Part II-B of its opinion to an argument that testimony was excluded in cases where the defendant had caused a person to be absent, but had not done so to prevent the person from

<sup>101</sup> 6 How. St. Tr. 769 (H.L. 1666).

<sup>102</sup> *Giles*, 128 S. Ct. at 2683 (citing, for example, *Lord Morley's Case*, 6 How. St. Tr. at 771).

<sup>103</sup> *Id.*

<sup>104</sup> The Court cited a Webster’s Dictionary from 1828: “[D]efining ‘procure’ as ‘to contrive and effect’” and also as “‘to get; to gain; to obtain; as by request, loan, effort, labor or purchase.’” *Id.* (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). The Court also cited a recent Oxford English Dictionary: “[D]efining ‘procure’ as ‘[t]o contrive or devise with care (an action or proceeding); to endeavour to cause or bring about (mostly something evil) *to or for* a person.’” *Id.* (quoting 12 THE OXFORD ENGLISH DICTIONARY 559 (2d ed. 1989) (definition I(3) of “procure”) (second alteration in original)).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 2683–84.

<sup>107</sup> *Id.* at 2684.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* (citing EDMUND POWELL, THE PRACTICE OF THE LAW OF EVIDENCE 166 (1st ed. 1858)).

<sup>110</sup> *Id.*

testifying.<sup>111</sup> According to the Court, “[p]rosecutors do not appear to have even *argued*” for admission of the uncontroverted statements because the defendant committed the murder for which he was on trial.<sup>112</sup> Citing a line of cases from the late 1700s and early 1800s that failed to invoke the forfeiture doctrine,<sup>113</sup> the Court concluded this section with perhaps its most persuasive argument:

There is nothing mysterious about courts’ refusal to [omit a purpose requirement]. The notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior *judicial* assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury. It is akin, one might say, to “dispensing with jury trial because a defendant is obviously guilty.”<sup>114</sup>

In Part II-C of its opinion, the Court argued that, “not only was the State’s proposed exception . . . not an ‘exceptio[n] established at the time of the founding,’ it is not established in American jurisprudence *since* the founding.”<sup>115</sup> According to the Court, American courts had not applied the exception to cases beyond deliberate witness tampering until 1985.<sup>116</sup> Recognizing that *Reynolds* can reasonably be construed to undercut this argument,<sup>117</sup> the Court downplayed the

---

<sup>111</sup> *Id.* at 2684–86.

<sup>112</sup> *Id.* at 2684.

<sup>113</sup> *See id.* at 2684–86 (citing, for example, *King v. Dingler*, (1791) 168 Eng. Rep. 383, in which the court excluded the uncontroverted deposition of George Dingler’s wife, who was allegedly stabbed multiple times by her husband and who was deposed by a magistrate, under oath, before she died).

<sup>114</sup> *Id.* at 2686 (citing *Crawford v. Washington*, 541 U.S. 36, 62 (2004)); *see also* *United States v. Lentz*, 282 F. Supp. 2d 399, 426 (E.D. Va. 2002) (“The Government argues that the forfeiture by wrongdoing exception applies . . . because Defendant procured the unavailability of Ms. Lentz by killing her. . . . Essentially, the Government asks the Court to find Defendant guilty of killing Ms. Lentz by a preponderance of the evidence in order to allow the evidence to be admitted to prove Defendant killed Ms. Lentz beyond a reasonable doubt. . . . 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.”), *aff’d*, 58 F. App’x 961 (4th Cir. 2003).

<sup>115</sup> *Giles*, 128 S. Ct. at 2687 (citation omitted).

<sup>116</sup> *Id.* (“The earliest case identified by the litigants . . . which admitted uncontroverted statements on a forfeiture theory without evidence that the defendant had acted with the purpose of preventing the witness from testifying was decided in 1985.” (citing *United States v. Rouco*, 765 F.2d 983 (11th Cir. 1985))).

<sup>117</sup> *See id.* (“*Reynolds* invoked broad forfeiture principles to explain its holding. The decision stated, for example, that ‘[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts,’ and that the wrongful-procurement rule ‘has its foundation’ in the principle that no one should be permitted to take advantage of his wrong . . . .” (quoting *Reynolds v. United States*, 98 U.S. 145, 158–59 (1879)) (alteration in original) (citation omitted)).



admittedly “broad forfeiture principles”<sup>118</sup> invoked in *Reynolds*, and declared:

*Reynolds* relied on these [broad] maxims (as the common-law authorities had done) to be sure. But it relied on them (as the common-law authorities had done) to admit prior testimony . . . where the defendant had engaged in wrongful conduct designed to prevent a witness’s testimony.<sup>119</sup>

The Court next argued that the “modern view” of the forfeiture doctrine supported its interpretation.<sup>120</sup> The Court cited Federal Rule of Evidence 804(b)(6), which applies only when the defendant “engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”<sup>121</sup> The Court also reasoned that seven of the twelve states that recognize forfeiture by wrongdoing duplicate the language of the federal rule,<sup>122</sup> and only Oregon has adopted the alternative view.<sup>123</sup>

Before addressing the dissent in Part II-D, the Court summarized its reasoning as follows:

In sum, our interpretation of the common-law forfeiture rule is supported by (1) the most natural reading of the language used at common law; (2) the absence of common-law cases *admitting* prior statements on a forfeiture theory when the defendant had not engaged in conduct designed to prevent a witness from testifying; (3) the common law’s uniform exclusion of uncontroverted inculpatory testimony by murder victims (except testimony given with awareness of impending death) in the innumerable cases in which the defendant was on trial for killing the victim, but was not shown to have done so for the purpose of preventing testimony; (4) a subsequent history in which the dissent’s broad forfeiture theory has not been applied. The first two and the last are highly persuasive; the third is in our view conclusive.<sup>124</sup>

---

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* (quoting FED. R. EVID. 804(b)(6)).

<sup>122</sup> *Id.* at 2688 n.2.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 2688.

In Part II-E,<sup>125</sup> the majority arguably retreated from its freshly-minted rule by declaring that the rule's requisite intent may be inferred in domestic abuse cases. The Court explained:

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 to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. *Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry . . . .*<sup>126</sup>

In dissent, Justice Breyer interpreted the above passage to indicate “that a showing of domestic abuse is [alone] sufficient to [invoke] the protection of the forfeiture rule in a trial for murder of the domestic abuse victim,”<sup>127</sup> which, in his view, significantly undermines the majority's intent requirement.

In closing, the Court remanded the case to determine whether the requisite intent evidence exists.<sup>128</sup>

## 2. *First Concurring Opinion—Justice Thomas*

Justice Thomas, who signed the majority opinion, wrote separately to argue that Avie's statement was not “testimonial,” and hence beyond the reach of the Confrontation Clause.<sup>129</sup> According to Thomas, the statements here were similar to those deemed non-testimonial in *Hammon v. Indiana*.<sup>130</sup> Like the statements in *Hammon*, the police questioning of Avie was not sufficiently formal because ““the statements were neither Mirandized nor custodial, nor accompanied by any similar indicia of formality.””<sup>131</sup> Ultimately, however, because the State had not preserved this issue for appeal and

---

<sup>125</sup> Because Part II-D responds to the dissent's argument in *Giles*, the concurring and dissenting opinions are summarized first before turning to the discussion of Part II-D.

<sup>126</sup> *Giles*, 128 S. Ct. at 2693 (emphasis added).

<sup>127</sup> *Id.* at 2708 (Breyer, J., dissenting).

<sup>128</sup> *Id.* at 2693 (majority opinion).

<sup>129</sup> *See id.* at 2693–94 (Thomas, J., concurring).

<sup>130</sup> *Davis v. Washington*, 547 U.S. 813 (2006) (*Hammon v. Indiana* is referenced by docket No. 05-5705, and was decided together with *Davis v. Washington*).

<sup>131</sup> *Giles*, 128 S. Ct. at 2693 (Thomas, J., concurring) (quoting *Davis*, 547 U.S. at 840).

because Justice Thomas agreed with the majority's characterization of "Confrontation Clause jurisprudence where the applicability of that Clause is not at issue," Justice Thomas felt the California Supreme Court opinion should be vacated.<sup>132</sup>

### 3. *Second Concurring Opinion—Justice Alito*

In his concurring opinion, Justice Alito agreed with Justice Thomas that Avie's out-of-court statement did not, in fact, implicate the Confrontation Clause.<sup>133</sup> In language that supports my thesis,<sup>134</sup> Justice Alito opined:

*The dissent's displeasure with the result in this case is understandable, but I suggest that the real problem concerns the scope of the confrontation right. 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. But th[at] question . . . is not before us . . . .*<sup>135</sup>

Like Justice Thomas, Justice Alito signaled a willingness to endorse a rather narrow definition of "testimonial," which would have resulted in a favorable ruling for the State had the issue been properly raised. Moreover, by affirming the dissent's "displeasure with the result in this case," Justice Alito became the fourth Justice to show concern with the overall outcome.<sup>136</sup>

### 4. *Final Concurring Opinion—Justices Souter and Ginsburg*

Justices Souter and Ginsburg agreed that forfeiture applies only when the defendant brings about the witness's absence "with intent to prevent testimony."<sup>137</sup> These Justices were primarily persuaded by the majority's "question begging" argument.<sup>138</sup> They were not persuaded by the historical record, concluding that "[t]he contrast between the Court's and Justice [Breyer]'s careful examinations of the historical record tells me that the early cases on the exception were not

<sup>132</sup> *Id.* at 2694.

<sup>133</sup> *Id.* (Alito, J., concurring).

<sup>134</sup> See *infra* Part III.B.

<sup>135</sup> *Giles*, 128 S. Ct. at 2694 (Alito, J., concurring) (citation omitted) (emphasis added).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 2694 (Souter, J., concurring).

<sup>138</sup> See *supra* note 114.

calibrated finely enough to answer the narrow question here.”<sup>139</sup> In part this is because “today’s understanding of domestic abuse had no apparent significance at the time of the Framing,” which accounts for the lack of an early example of forfeiture in that context.<sup>140</sup>

In language that again supports my thesis,<sup>141</sup> Justices Souter and Ginsburg concluded that “the element of intention would normally be satisfied by the *intent inferred* on the part of the domestic abuser in the classic abusive relationship,”<sup>142</sup> where the abuser normally intends “to isolate the victim from outside help, including the aid of law enforcement and the judicial process.”<sup>143</sup> According to these Justices, if the evidence showed a continuing abusive relationship of this sort, the intent required by *Giles* should be inferred.<sup>144</sup>

#### 5. Dissent—Justices Breyer, Stevens, and Kennedy

The dissenting opinion was separated into four primary parts.<sup>145</sup> In Part I, citing *Lord Morley’s Case* and similar founding-era cases, the dissent found sufficient evidence satisfying *Crawford’s* threshold requirement that the forfeiture exception be established by the time of the nation’s founding.<sup>146</sup>

In Part II, the dissent identified “several strong reasons” for concluding that forfeiture applies in the absence of the majority’s required specific intent.<sup>147</sup> Beginning with the majority’s textualist argument, the dissent first argued that the language common law courts “used in setting forth the exception is broad enough to cover the wrongdoing at issue in the present case (murder) . . . .”<sup>148</sup> The dissenters reasoned:

A witness whom a defendant murders is kept from testifying “by the means . . . of the prisoner” *i.e.*, the defendant; murder is indeed an “ill practice,” that leads to the witness’ absence; one can fairly call a murder a “contrivance to keep the witness out of the way”; murder, if not a “fraudulent and

<sup>139</sup> *Giles*, 128 S. Ct. at 2694 (Souter, J., concurring).

<sup>140</sup> *Id.* at 2695.

<sup>141</sup> See *infra* Part IV.A.

<sup>142</sup> *Giles*, 128 S. Ct. at 2695 (Souter, J., concurring) (emphasis added).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* But see *id.* at 2695–709 (Breyer, J., dissenting) (noting that in the domestic abuse context, where a victim of the violence makes statements to the police, it is sometimes not certain whether the defendant subsequently killed her to prevent her from testifying, to retaliate against her for making statements, or in the course of another abusive incident).

<sup>145</sup> See *id.* at 2695–709 (Breyer, J., dissenting).

<sup>146</sup> *Id.* at 2695–96.

<sup>147</sup> *Id.* at 2696.

<sup>148</sup> *Id.*

indirect means” of keeping the witness from testifying, is a far worse, direct one; and when a witness is “absent” due to murder, the killer likely brought about that absence by his “own wrongful procurement.”<sup>149</sup>

In contrast to the majority, the dissenting Justices “found no case that uses language that would *not* bring a murder and a subsequent trial for murder within its scope.”<sup>150</sup>

Second, the dissenters cited the “forfeiture rule’s basic purposes and objectives,” concluding that the maxim that “no one shall be permitted to take advantage of his own wrong” obviously applies to murder.<sup>151</sup> The dissent reasoned:

What more “evil practice,” what greater “wrong,” than to murder the witness? And what greater evidentiary “advantage” could one derive from that wrong than thereby to prevent the witness from testifying, *e.g.*, preventing the witness from describing a history of physical abuse that is not consistent with the defendant’s claim that he killed her in self-defense?<sup>152</sup>

The dissent later reiterated this argument, highlighting the equities of the situation:

[T]he majority’s insistence upon a showing of *purpose* or *motive* cannot be squared with the exception’s basically ethical objective. If H, by killing W, is able to keep W’s testimony out of court, then he has successfully “take[n] advantage of his own wrong.” And he does so whether he killed her *for the purpose of* keeping her from testifying, with *certain knowledge* that she will not be able to testify, or with *a belief* that rises to a *reasonable level of probability*. The inequity consists of his being able to *use* the killing to keep out of court her statements against him.<sup>153</sup>

---

<sup>149</sup> *Id.* at 2696–97 (quoting Lord Morley’s Case, (1666) 6 How. St. Tr. 769, 771 (H.L.); Harrison’s Case, (1692) 12 How. St. Tr. 833, 868 (H.L.); Queen v. Scaife, (1851) 117 Eng. Rep. 1271, 1273 (Q.B.); Lord Fenwick’s Case, (1696) 13 How. St. Tr. 537, 594 (H.C.); Reynolds v. United States, 98 U.S. 145, 158 (1879)) (omission in original) (citations omitted).

<sup>150</sup> *Id.* at 2697 (emphasis added).

<sup>151</sup> *Id.* (quoting *Reynolds*, 98 U.S. at 159).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 2699 (quoting *Reynolds*, 98 U.S. at 159) (citation omitted) (second alteration in original).

Third, the dissent pointed to related areas of the law endorsing the State's view.<sup>154</sup> The common law, for example, prohibits a life insurance beneficiary who murders an insured from recovering under the policy, and similarly prevents a will beneficiary who murders the testator from collecting under that will.<sup>155</sup> In both situations, forfeiture applies regardless of the murderer's purpose.<sup>156</sup>

Fourth, the dissenters argued that, even if the forfeiture doctrine contains an intent requirement, Giles easily meets this requirement.<sup>157</sup> According to the dissent, *knowledge alone* is sufficient to show the requisite intent.<sup>158</sup> To support this argument, the dissent cited an opinion written by Justice Scalia<sup>159</sup> for the established proposition that "[a] 'man who performs an act which it is known will produce a particular result is . . . presumed to have anticipated that result and to have intended it.'"<sup>160</sup> Stated differently, a person presumably intends the natural and probable consequences of his acts. Here, Giles knew that murdering his ex-girlfriend would prevent her from testifying; the law therefore presumes he intended that result.<sup>161</sup>

Perhaps most significantly, the dissent next argued that requiring "proof of the defendant's *purpose* (rather than *intent*), as the majority does, creates serious practical evidentiary problems"<sup>162</sup> caused by the extremely difficult task of proving a person's subjective motivations.<sup>163</sup> The dissent explained:

Consider H who assaults W, knows she has complained to the police, and then murders her. H *knows* that W will be unable

<sup>154</sup> *Id.* at 2697.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 2697–98 ("This is because the defendant here knew that murdering the ex-girlfriend would keep her from testifying; and that knowledge is sufficient to show the *intent* that law ordinarily demands.").

<sup>158</sup> *Id.* at 2698.

<sup>159</sup> *Id.* (citing *United States v. Aguilar*, 515 U.S. 593, 613 (1995) (Scalia, J., dissenting) ("[T]he jury is entitled to presume that a person intends the natural and probable consequences of his acts.")).

<sup>160</sup> *Id.* (quoting *Allen v. United States*, 164 U.S. 492, 496 (1896)).

<sup>161</sup> See *id.*; cf. Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 BROOK. L. REV. 241, 251–53 (2005) (arguing that the term "testimonial" should be defined to encompass "the transmittal of information for use in prosecution"; that this test should focus on the frame of mind of the declarant at the time her out-of-court statement is made; and that determination of the declarant's intent should depend on whether the declarant understood that there was a significant probability that her statement would be used in a later prosecution, rather than a particular desire for that use).

<sup>162</sup> *Giles*, 128 S. Ct. at 2699 (Breyer, J., dissenting).

<sup>163</sup> See generally Marc McAllister, *What the High Court Giveth the Lower Courts Taketh Away: How to Prevent Undue Scrutiny of Police Officer Motivations Without Eroding Randolph's Heightened Fourth Amendment Protections*, 56 CLEV. ST. L. REV. 663 (2008) (analyzing similar difficulties in proving the subjective motivations of police).

to testify against him at any future trial. But who knows whether H's knowledge played a major role, a middling role, a minor role, or no role at all, in H's decision to kill W? Who knows precisely what passed through H's mind at the critical moment?<sup>164</sup>

According to the dissent, these practical evidentiary problems will tend to create inequitable outcomes, a result which is particularly ironic given the equitable nature of the forfeiture rule.<sup>165</sup> For example, under the majority's rule, the defendant who assaults his wife and subsequently threatens her with harm if she testifies cannot benefit from his wrong, whereas the defendant who assaults his wife and subsequently murders her in a fit of rage can.<sup>166</sup>

The final argument in Part II was that states should be free to develop and apply their own evidentiary rules.<sup>167</sup> However, by raising the constitutional barrier of admission for such testimonial statements, the majority's rule necessarily prevents the states from doing so.<sup>168</sup>

In Part III of its opinion, the dissent argued (persuasively to Justices Souter and Ginsburg) that the cases relied upon by the majority do *not*, in fact, support the view that forfeiture is limited to instances where the defendant intends to keep the witness from testifying.<sup>169</sup> According to the dissent, the common law cases instead "suggest that the forfeiture rule would apply where the witness' absence was the *known consequence* of the defendant's intentional wrongful act"<sup>170</sup>—the argument that "procurement" implies purpose or motive is unpersuasive. Citing the same dictionary relied upon by the majority, the dissent reasoned that "[a]lthough a person may 'procure' a result purposefully, a person may also 'procure' a result by causing it," or by "'bring[ing] [it] about,'" or "'effect[ing],'" all of which "say nothing about motive or purpose."<sup>171</sup> The same goes for the majority's argument regarding the word "contrivance."<sup>172</sup>

---

<sup>164</sup> *Giles*, 128 S. Ct. at 2699 (Breyer, J., dissenting).

<sup>165</sup> *Id.* ("The inequity consists of [a person] being able to *use* the killing to keep out of court her statements against him.")

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 2700.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 2698–702.

<sup>170</sup> *Id.* at 2701 (citing *Lord Morley's Case*, (1666) 6 How. St. Tr. 769 (H.L.), *Diaz v. United States*, 223 U.S. 442 (1912), and *Motes v. United States*, 178 U.S. 458 (1900), as illustrative).

<sup>171</sup> *Id.* (citing 2 WEBSTER, *supra* note 104).

<sup>172</sup> *Id.* ("Even if a defendant had contrived, *i.e.*, devised or planned, to murder a victim, thereby keeping her away, it does not mean that he did so with the purpose of keeping her away in mind.")

Next, the dissent attacked the majority's inferences drawn from the absence of common law murder cases in which the victim's Marian statement was admitted on the ground the defendant had killed the victim.<sup>173</sup> The dissent found this omission unsurprising, explaining:

The most obvious reason why the majority cannot find an instance where a court applied the rule of forfeiture at a murder trial is that many (perhaps all) common-law courts thought the rule of forfeiture irrelevant in such cases. In a murder case, the relevant witness, the murder victim, was dead; and historical legal authorities tell us that, when a witness was dead, the common law admitted a Marian statement. . . . Because the Marian statements of a deceased witness were admissible simply by virtue of the witness' death, there would have been no need to argue for their admission pursuant to a forfeiture rule.<sup>174</sup>

The dissent believed that a Marian statement could never be admitted unless the defendant had a previous opportunity to confront the witness. This meant that either of two situations occurred in a murder trial where the witness was dead: (a) the Marian statement had been properly confronted by the defendant, and it came into evidence without the forfeiture exception; or (b) it was not confronted, and thus would not have been admitted regardless.<sup>175</sup> Because the forfeiture exception was not implicated under a rule always requiring prior confrontation, common law courts would have thought the forfeiture exception irrelevant.<sup>176</sup>

According to the dissent, this same view explains the founding-era dying declaration cases. The *Giles* majority argued that the parties did not invoke forfeiture in dying declaration cases because admission pursuant to the forfeiture exception required the difficult showing that the defendant killed the witness with the *purpose* of securing the absence of the witness at trial.<sup>177</sup> In contrast, the dissent believed that the parties did not argue forfeiture in dying declaration cases because the forfeiture exception permitted admission only of a properly taken

---

<sup>173</sup> *Id.* at 2702.

<sup>174</sup> *Id.* (citations omitted).

<sup>175</sup> *Id.* at 2702–03.

<sup>176</sup> *Id.* at 2703. In support of this rationale, the dissent cited two cases relied upon by the majority, *King v. Woodcock* and *King v. Dingler*, where the forfeiture rule was not invoked—not because of the state of mind of the defendant when he committed his crime, but rather because the victim's testimony was not a properly taken Marian statement. *See id.* (citing *King v. Woodcock*, (1789) 168 Eng. Rep. 352; *King v. Dingler*, (1791) 168 Eng. Rep. 383).

<sup>177</sup> *Id.* at 2688 (majority opinion).



Marian deposition, and, where death was at issue, the forfeiture exception was irrelevant.<sup>178</sup> According to the dissent:

[I]f the Marian deposition was proper, the rule of forfeiture was unnecessary [because the statement was confronted]; if the deposition was improper, the rule of forfeiture was powerless to help. That is why we find lawyers in “dying declaration” cases arguing that the dying declaration was either a proper Marian deposition (in which case it was admitted) or it was a “dying declaration” (in which case it was admitted [as its own recognized exception]), or both.<sup>179</sup>

Ultimately, the dissent concluded that “there are too few old records available for us to draw firm conclusions.”<sup>180</sup> Thus, “the most the majority might show is that the common law was not clear on th[is] point.”<sup>181</sup> With Justices Souter and Ginsburg in agreement with this claim,<sup>182</sup> five of the nine Justices were ultimately unconvinced that the historical record adequately resolved the intent issue.<sup>183</sup>

## II. WHY *GILES* WILL BE NARROWLY CONSTRUED

The narrow holding of *Giles*, requiring proof that the accused intended to silence the would-be witness for forfeiture to apply, will make it difficult for prosecutors to successfully invoke the forfeiture doctrine. However, we should not expect prosecutors to abandon all attempts to admit such disputed evidence, nor should we expect courts to adhere strictly to the *Giles* rule. In this section, I highlight

<sup>178</sup> *Id.* at 2704 (Breyer, J., dissenting).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 2705 (“[T]he majority’s house of cards has no foundation; it is built on what is at most common-law silence on the subject. The cases it cites tell us next to nothing about admission of unfronted statements.”).

<sup>182</sup> *See id.* at 2694 (Souter, J., concurring).

<sup>183</sup> Part IV of the dissent is written in rebuttal to the majority’s response to its argument, which is presented in Part II-D of the majority opinion. *See id.* at 2705–08 (Breyer, J., dissenting). For further illumination, the reader should review Part II-D-1 of the majority opinion, which responds to the dissent and argues that application of the common law wrongful procurement rule did not depend on prior confrontation, as suggested by the dissent, but rather on the *purpose* of the wrongful procurement. *See id.* at 2688–91 (majority opinion) (disagreeing with the dissent’s interpretation of the historical record). In this Part, the majority argues that the dissent’s argument is essentially self-defeating, in that it argues that the common law forfeiture rule was not applied unless the defendant had a previous opportunity to confront the witness (which is not the case here in *Giles*). *Id.* However, in Part IV of the dissent, Justice Breyer clarifies that “modern courts have changed the ancient common-law forfeiture rule . . . now admit[ting] unfronted prior testimonial statements pursuant to such a rule. . . . [This] is a fairly recent evidentiary development.” *Id.* at 2706 (Breyer, J., dissenting). Note that Part II-D-2 of the majority opinion was signed by only four Justices (Scalia, Roberts, Thomas, and Alito). *Id.* at 2680 (majority opinion).

several reasons why prosecutors and jurists will seek alternative methods for admitting the type of evidence excluded in *Giles*, thereby circumventing its holding.

The practical result of *Giles* will be to limit the instances where forfeiture will be successfully invoked,<sup>184</sup> which will in turn decrease the amount of evidence admitted at trial. Because some of this excluded evidence would have assisted jurors in ascertaining the truth (despite a lack of confrontation), at times the truth-seeking process will be undermined by *Giles*'s rule.<sup>185</sup> As a result, courts will likely narrow *Giles*'s holding in those instances where the rule would cloud the truth.

In *Giles*, for example, Brenda Avie's statements provided significant circumstantial evidence as to whether the homicide, to which no eyewitnesses were available, had been committed unlawfully.<sup>186</sup> Thus, excluding Avie's statements would effectively permit the defendant to present a one-sided account of his relationship with the victim, a result tending to diminish the jury's ability to assess the truth.<sup>187</sup> Given the Court's belief that "the 'Confrontation Clause's very mission' . . . is to 'advance "the accuracy of the truth-determining process in criminal trials,"'"<sup>188</sup> this result is particularly ironic.

Furthermore, in a post-*Roberts* world, *Crawford*'s strict cross-examination requirement makes it more difficult for prosecutors to secure convictions, particularly for domestic abuse.<sup>189</sup> To counter

---

<sup>184</sup> See *State v. Romero*, 133 P.3d 842, 854 (N.M. Ct. App. 2006) ("The prosecution will surely be able to show that the defendant procured the witness's absence in more cases than it will be able to show that the defendant did so with the specific intent of preventing the witness from testifying."), *aff'd*, 156 P.3d 694 (N.M. 2007); see also *Giles*, 128 S. Ct. at 2708 (Breyer, J., dissenting) ("To insist upon a showing of purpose rather than plain (knowledge-based) intent would limit the amount of uncontroverted evidence that the jury might hear.").

<sup>185</sup> See *supra* notes 80–87 and accompanying text (describing a similar sentiment underlying the California Supreme Court's opinion in *Giles*).

<sup>186</sup> Respondent's Brief on the Merits, *supra* note 25, at 11–12.

<sup>187</sup> Indeed, eliminating untested evidentiary accounts is the very driving force behind adoption of the Confrontation Clause. See *Tennessee v. Street*, 471 U.S. 409, 414–15 (1985) (noting that "[t]he Clause's fundamental role i[s] protecting the right of cross-examination," and declaring that, without the ability to present rebuttal evidence, "the jury would have been impeded in its task of evaluating the truth of respondent's testimony"—"a result [that] would have been at odds with the Confrontation Clause's very mission").

<sup>188</sup> *United States v. Inadi*, 475 U.S. 387, 396 (1986) (quoting *Street*, 471 U.S. at 415); see also *United States v. Dhinsa*, 243 F.3d 635, 653 (2d Cir. 2001) ("Adoption of Dhinsa's proposed limitation [of the waiver by wrongdoing doctrine] would limit the proof against him—the very result that the waiver-by-misconduct doctrine seeks to remedy."). But see *Friedman*, *supra* note 26, at 1028 (1998) ("Truth-determination is itself a poor criterion for determining applicability of the confrontation right. That is, whether or not admissibility of the challenged statement would assist truth-determination should not be determinative of whether admissibility violates the confrontation right.").

<sup>189</sup> See Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 750

this unfortunate effect, a robust forfeiture doctrine is needed in cases where juries would benefit from the evidence but where *Crawford* would bar its admission.<sup>190</sup> In fact, between 2004 and 2008 courts often reacted to *Crawford* by favoring a broader forfeiture doctrine than that permitted by *Giles*. After *Crawford*, many jurisdictions either adopted the forfeiture doctrine if they had not done so before, or expanded the doctrine<sup>191</sup> to encompass more testimonial statements.<sup>192</sup> Many of these courts expanded the doctrine out of a perceived necessity for it. The Wisconsin Supreme Court, for example, declared “that in a post-*Crawford* world the broad view of forfeiture . . . is essential.”<sup>193</sup> The California Supreme Court similarly opined that post-*Crawford* courts “should be able to [invoke forfeiture to] further the truth-seeking function of the adversary process when necessary, allowing fact finders access to relevant evidence that the defendant caused not to be available through live testimony.”<sup>194</sup> Despite the narrow holding of *Giles*, prosecutors and jurists concerned with truth-determination should continue to advance this sentiment post-*Giles*.

A second flaw in the *Giles* rule is that it creates incentives to silence would-be witnesses. According to confrontation expert, Professor Richard D. Friedman, where the “victim made a testimonial statement against the accused before the final assault and the accused was . . . aware of that fact — denying forfeiture absent a showing of purpose to render the witness unavailable would create a horribly

---

(2005) (reporting that 63 percent of survey respondents from over sixty prosecutors’ offices concluded that *Crawford* significantly impeded prosecutions of domestic violence, and that 65 percent reported that victims of domestic violence are less safe in their jurisdictions as a result of *Crawford*).

<sup>190</sup> See, e.g., *id.* at 808 (arguing that *Crawford* increased the likelihood that domestic abusers will threaten their victims before trial to derail the prosecution, and concluding that “[t]he doctrine of forfeiture by wrongdoing would help to prevent abusers from manipulating witnesses”); see also Brief of Richard D. Friedman as Amicus Curiae in Support of Petition for Certiorari at 2, *Giles v. California*, 128 S. Ct. 2678 (2008) (No. 07-6053), 2007 WL 4231058 (“In *Crawford* . . . , this Court demolished the old framework of doctrine of the Confrontation Clause and began construction of a radically different one. A central and integral component of confrontation doctrine is the principle that the accused may forfeit the confrontation right if his wrongful conduct renders the witness unavailable. Accordingly, the Court cannot build the new confrontation framework soundly without developing a carefully considered conception of forfeiture.”).

<sup>191</sup> See, e.g., *United States v. Garcia-Meza*, 403 F.3d 364, 370–71 (6th Cir. 2005) (applying forfeiture doctrine in murder case with facts very similar to *Giles*); *State v. Jensen*, 727 N.W.2d 518, 533 (Wis. 2007) (applying forfeiture doctrine in murder case and citing *Garcia-Meza*).

<sup>192</sup> *Jensen*, 727 N.W.2d at 533.

<sup>193</sup> *Id.* at 535.

<sup>194</sup> *People v. Giles*, 152 P.3d 433, 444 (Cal. 2007), *cert. granted*, 128 S. Ct. 976 (2008), *vacated*, 128 S. Ct. 2678 (2008).

perverse incentive, to ‘finish the job’ and make the assault a fatal one.”<sup>195</sup> In such cases, the accused often has multiple motivations for the assault, and evidence of a specific intent to prevent the victim from testifying is often slim, rendering the victim’s prior statements inadmissible under *Giles*.<sup>196</sup>

One can easily imagine scenarios where the *Giles* rule would, in fact, shield blatant wrongdoers. Take, for example, a defendant who decides to murder his wife. For several months, this defendant carefully crafts his plan to perfection. One week before the murder, the couple gets into a heated argument. Knowing his murder plan is nearly flawless, and feeling somewhat boastful at the time, the defendant lets loose his intentions, stating, “none of this matters anyway because by next Tuesday night you will be dead from the poison.” Startled by this admission, the wife calls the police, reports the incident, and states that she has reason to believe her husband will kill her next Tuesday; moreover, that he will do so by poisoning her. Unbeknownst to the wife, the defendant overhears this conversation.

Still motivated by an overwhelming desire to kill his wife (i.e., not a desire to prevent her from testifying), the defendant decides the best thing to do would be to complete the job. And so, the following Tuesday night, just as he warned, the defendant executes his murder by poisoning his wife. With no witnesses and not much physical evidence, the prosecutor wishes to introduce the victim’s statement in which the victim accurately predicted both the time and the manner of her death. This evidence, it would seem, would have a big impact on the jury. However, under *Giles* it would be very difficult to prove the killing was specifically intended to prevent the victim from testifying. This is particularly true here because the defendant had been planning his crime for months, which indicates that silencing his victim due to her report was not his true motivation. The defendant was going to kill his wife regardless, and her police report only solidified his plan.

As applied to my hypothetical defendant, the *Giles* rule has, at the front end, created a perverse incentive to “finish the job.” This is ironic and self-defeating, given that “the primary reasoning behind [the forfeiture] rule is . . . to deter criminals from intimidating or ‘taking care of’ potential witnesses against them.”<sup>197</sup> In addition, at the back end, the *Giles* rule would prevent jurors from hearing the one piece of evidence that might resolve their doubt as to the defendant’s

---

<sup>195</sup> Brief of Richard D. Friedman as Amicus Curiae in Support of Respondent at 8 n.5, *Giles v. California*, 128 S. Ct. 2678 (2008) (No. 07-6053), 2008 WL 859395.

<sup>196</sup> *See id.*

<sup>197</sup> *United States v. Thompson*, 286 F.3d 950, 962 (7th Cir. 2002); *see also* *People v. Geraci*, 649 N.E.2d 817, 821 (N.Y. 1995) (also noting public policy motivations).

guilt. While a work of fiction, the above hypothetical is not so convoluted that it is unlikely to occur. This hypothetical is, for example, quite similar to *State v. Jensen*.<sup>198</sup>

A third reason to expect a limiting of *Giles* is that its rule may often lead to inequitable inconsistencies.<sup>199</sup> Under the *Giles* rule, the more heinous the act of silencing, the more likely the evidence will be excluded. For example, a defendant who successfully detains a potential witness by bribing her would forfeit his confrontation right, whereas the defendant who kills his victim would not. All things being equal, the killer would have a better chance of acquittal than would the petty briber. This result seems wrong. If the Court is willing to permit a defendant's wrongdoing to override his confrontation right (as indicated by *Crawford*, *Davis*, and *Giles*), the Court should do so in cases of intentional killings.<sup>200</sup> Murder, after all, "falls in the worst class of wrongdoing and 'unclean hands.'"<sup>201</sup>

Despite the specific intent required by *Giles*, courts will continue to believe that a defendant, regardless of his particular intent, should not be permitted to insist upon the very legal protections his wrongful acts have made impossible.<sup>202</sup> As one court recently put it:

[I]f the forfeiture rule is to further the maxim that "no one shall be permitted to take advantage of his own wrong," then the motivation for the wrongdoing must be deemed irrelevant. Whether a murder is motivated by a desire to silence a

---

<sup>198</sup> 727 N.W.2d 518 (Wis. 2007) (noting possible application of the forfeiture exception to defendant's intentional homicide of his wife, who died of poisoning, where during the weeks prior to her death, defendant's wife repeatedly voiced her fear that defendant was trying to poison her; in a post-*Crawford* world, the court determined that some of victim's out-of-court statements were inadmissible under *Crawford*, but that the forfeiture exception would extinguish defendant's confrontation rights if, on remand, the prosecutor could prove by a preponderance of evidence that the accused caused the witness's absence).

<sup>199</sup> See *Giles v. California*, 128 S. Ct. 2678, 2699 (Breyer, J., dissenting).

<sup>200</sup> Respondent's Brief on the Merits, *supra* note 25, at 16.

<sup>201</sup> *Id.* at 13.

<sup>202</sup> See, e.g., *State v. Romero*, 156 P.3d 694, 703 (N.M. 2007) (Bosson, J., concurring in part and dissenting in part) ("Whether [defendant] caused [his wife's] absence with the specific intent to prevent his wife from testifying, or whether he caused that absence simply in a drunken rage, the effect is the same. The witness cannot speak for herself because she is dead at [defendant's] hands. It seems a perversion of the Constitution and the Confrontation Clause to allow any defendant to profit so from his own misdeeds."); see also *Giles*, 128 S. Ct. at 2709 (2008) (Breyer, J., dissenting) ("Regardless of a defendant's purpose, threats, further violence, and ultimately murder, can stop victims from testifying."); *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982) (arguing that a defendant cannot demand live testimony over out-of-court statements by creating the condition that prevents it); Respondent's Brief on the Merits, *supra* note 25, at 15 (arguing that regardless of the defendant's specific motive, the damage inflicted on the trial's truth-seeking function by the loss of the evidence in any particular case, and its one-sided replacement, remains the same).

witness, financial gain, or mere sadism, the murderer should not be permitted to gain an advantage.<sup>203</sup>

While the above argument was largely rejected in *Giles*, the inequities that would flow from a strict interpretation of the *Giles* rule remain, and one can expect courts to shy away from inequitable results.

The fourth reason jurists will seek to circumvent *Giles* is the extreme difficulty prosecutors will face in meeting its literal requirements, in part due to the difficult task of proving actual intent. The *Giles* holding ignores the reality<sup>204</sup> that those facing potential criminal charges *sometimes do* murder potential witnesses to prevent their testimony in future court proceedings,<sup>205</sup> but that evidence of such a purpose is extremely difficult to garner. Although it is hard to quantify exactly how often a defendant kills with the requisite *Giles* intent without leaving behind the evidence needed to prove that intent, the difficulties inherent in proving subjective motives are bound to create substantial evidentiary obstacles.<sup>206</sup>

The fifth reason to expect jurists to narrowly construe *Giles* concerns the special problems of proof inherent in the domestic abuse context. A byproduct of the shift from *Roberts* to *Crawford* has been to curtail the ability of prosecutors to secure convictions in domestic abuse cases.<sup>207</sup> One recent commentator, for example, reported that 63 percent of survey respondents from over sixty prosecutors' offices felt that *Crawford* significantly impeded prosecutions of domestic violence, and 65 percent reported that victims of domestic violence are less safe as a result of *Crawford*.<sup>208</sup> This is no trivial concern. Each year, domestic violence results in more than 2 million injuries and leads to 1,500 deaths, and it is difficult to prove because the victim is generally reluctant or unable to testify.<sup>209</sup>

---

<sup>203</sup> *People v. Ruiz*, No. H026609, 2005 WL 1670426, at \*6 (Cal. Ct. App. July 19, 2005) (citation omitted).

<sup>204</sup> According to the *Giles* majority, “[i]n cases where the evidence suggested that the defendant had caused a person to be absent, *but had not done so to prevent the person from testifying*—as in the *typical murder case* involving accusatorial statements by the victim—the testimony was excluded unless it was confronted or fell within the dying declaration exception.” *Giles*, 128 S. Ct. at 2684 (emphasis added). While nearly impossible to prove, I doubt that the “typical murder” of a potential witness of some prior crime does not often involve at least a partial motive to quiet the witness.

<sup>205</sup> See, e.g., *United States v. Emery*, 186 F.3d 921, 925 (8th Cir. 1999) (finding substantial proof that a would-be witness against a defendant on drug-related charges was cooperating with federal authorities, that defendant was aware of such cooperation, that defendant participated in killing the would-be witness, and that part of defendant’s motivation for killing her was to stop her from cooperating with authorities).

<sup>206</sup> See *supra* note 164 and accompanying text.

<sup>207</sup> See Lininger, *supra* note 189, at 750.

<sup>208</sup> *Id.*

<sup>209</sup> See *id.* at 751, 768–71 (explaining why domestic abuse victims are often reluctant to

As noted by Justice Breyer<sup>210</sup> and essentially ratified by the majority,<sup>211</sup> “the rule of forfeiture is implicated primarily where domestic abuse is at issue.”<sup>212</sup> As applied to the domestic abuse arena, a constitutional evidentiary requirement that requires a showing of purpose rather than probabilistic knowledge, as does the *Giles* rule, may permit the person who threatened or murdered the declarant to “avoid conviction for earlier crimes by taking advantage of later ones.”<sup>213</sup> As Justice Breyer argues, such a rule threatens to break the promise of *Davis*:

In *Davis*, we recognized that “domestic violence” cases are “notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.” We noted the concern that “[w]hen this occurs, the Confrontation Clause gives the criminal a windfall.” And we replied to that concern by stating that “one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.” To the extent that it insists upon an additional showing of purpose, the Court breaks the promise implicit in those words and, in doing so, grants the defendant not fair treatment, but a windfall.<sup>214</sup>

Cracks in the foundation of the majority’s logic provide a sixth reason to expect a narrowing of *Giles*. While much of the majority opinion is devoted to proving the existence of its rule at common law, a majority of Justices concluded that the historical record simply did not resolve the issue. Justices Souter and Ginsburg, who joined the majority opinion but wrote a separate concurrence, were admittedly unpersuaded, concluding that “the early cases on the exception were not calibrated finely enough to answer the narrow question here.”<sup>215</sup>

Once one concedes that the historical record does not resolve the precise question in *Giles*, the equitable nature of the rule takes on added significance. The problem here is that all of the Court’s prior

testify against their abuser, and noting how frequently abuse victims recant).

<sup>210</sup> See *Giles v. California*, 128 S. Ct. 2678, 2708–09 (2008) (Breyer, J., dissenting).

<sup>211</sup> See *id.* at 2693 (majority opinion) (noting the role of domestic violence in dissuading victims from seeking outside help and preventing cooperation with authorities).

<sup>212</sup> See *id.* at 2708 (Breyer, J., dissenting); see also Lininger, *supra* note 189, at 768 (“[Domestic violence] cases are more likely than others to rely on hearsay statements by accusers who may recant or refuse to cooperate with the prosecution at the time of trial. . . . Recent evidence suggests 80 to 85 percent of battered women will recant at some point.”).

<sup>213</sup> *Giles*, 128 S. Ct. at 2708–09 (Breyer, J., dissenting).

<sup>214</sup> *Id.* at 2709 (citations omitted) (alteration in original).

<sup>215</sup> *Id.* at 2694 (Souter, J., concurring).

statements—including statements made mere months prior to this decision—caused many courts to conclude that the forfeiture doctrine should be interpreted much more broadly.<sup>216</sup> A plain reading of *Reynolds* certainly appears to support this view. Indeed, *Reynolds* appears to sanction an open-ended exception for all would-be witnesses who are dead at the time of trial.<sup>217</sup> In 1878, the *Reynolds* Court declared:

The constitutional right of a prisoner to confront the witness and cross-examine him is not to be abrogated, *unless it be shown that the witness is dead*, or out of the jurisdiction of the court; or that, *having been summoned*, he appears to have been kept away by the adverse party on the trial.<sup>218</sup>

The *Reynolds* Court does not differentiate between different types of deceased witnesses in this passage. Further, if we examine the actual *Reynolds* passage interpreted by the *Giles* Court, the dissent again appears to have the stronger argument. Recall that the *Reynolds* Court described the forfeiture doctrine in this manner:

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by [the accused's] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege.<sup>219</sup>

---

<sup>216</sup> See, e.g., *United States v. Garcia-Meza*, 403 F.3d 364, 370–71 (6th Cir. 2005) (“The Supreme Court’s recent affirmation of the ‘essentially equitable grounds’ for the rule of forfeiture strongly suggests that the rule’s applicability does not hinge on the wrongdoer’s motive. The Defendant, regardless of whether he intended to prevent the witness from testifying against him or not, would benefit through his own wrongdoing if such a witness’s statements could not be used against him, which the rule of forfeiture, based on principles of equity, does not permit.”).

<sup>217</sup> See *Reynolds v. United States*, 98 U.S. 145, 151–52 (1878).

<sup>218</sup> *Id.* (first emphasis added).

<sup>219</sup> *Id.* at 158.



Although Justice Scalia is an admitted textualist,<sup>220</sup> he was not persuaded by the fact that the *Reynolds* Court's analysis simply does not contain an "intent" requirement.<sup>221</sup> The closest the *Reynolds* Court comes to such a requirement is the assertion that if an accused "voluntarily keeps the witnesses away," he cannot invoke his right to confront those witnesses.<sup>222</sup> However, by its terms, "voluntarily keep[ing] [a] witness[] away" would naturally include voluntarily killing that witness for any reason, such that the witness is unable to attend future court proceedings.<sup>223</sup>

Finally, and perhaps most troubling, the *Giles* rule creates a logical disconnect between the two major confrontation exceptions ratified by the *Crawford* Court, forfeiture by wrongdoing and the dying declaration.<sup>224</sup> Because dying declarations are routinely admitted in murder trials without opportunity for confrontation and absent proof of witness tampering, they bear a striking resemblance to the statements admitted against *Giles*.<sup>225</sup> If dying declarations are admissible without having to prove intent-to-silence, while similar declarations made in the absence of impending death are not, the Court should provide a principled basis for this constitutional distinction.<sup>226</sup> *Giles*, however, does not do so.

<sup>220</sup> See Gregory Bassham, *Justice Scalia's Equitable Constitution*, 33 J.C. & U.L. 143, 143 (2006) ("Scalia himself has claimed that '[w]hat I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.'" (quoting Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997)) (alteration in original)); see also Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1296 (1990).

<sup>221</sup> See, e.g., *State v. Romero*, 133 P.3d 842, 853 (N.M. Ct. App. 2006) ("[W]e do not believe that *Reynolds* says anything about whether the intent to silence requirement is required by the constitution."), *aff'd*, 156 P.3d 694 (N.M. 2007).

<sup>222</sup> Joshua Deahl, Note, *Expanding Forfeiture Without Sacrificing Confrontation After Crawford*, 104 MICH. L. REV. 599, 608 (2005) (quoting *Reynolds*, 98 U.S. at 158).

<sup>223</sup> *Id.* (quoting *Reynolds*, 98 U.S. at 158) ("[T]he [*Reynolds*] Court never undertook any consideration of *Reynolds*' purpose, apparently indifferent to the motivations underlying his obstructionism.").

<sup>224</sup> The dying declaration would typically permit the introduction of unconfessed statements where the witness was under the apprehension of death at the time she made the damaging statements. See *Giles v. California*, 128 S. Ct. 2678, 2685 (2008).

<sup>225</sup> See Respondent's Brief on the Merits, *supra* note 25, at 13.

<sup>226</sup> The best justification we have is simply that the dying declaration exception was around at the time of the Founding, and a constitutional right is to be interpreted in accordance with the law that existed when the right was adopted. See *Crawford v. Washington*, 541 U.S. 36, 56 n.6 (2004) ("If [the dying declaration] exception must be accepted on historical grounds, it is *sui generis*."); see also *Mattox v. United States*, 156 U.S. 237, 243 (1895) ("[T]here could be nothing more directly contrary to the letter of the [Confrontation Clause] than the admission of dying declarations. They are rarely made in the presence of the accused, they are made without any opportunity for examination or cross-examination, . . . yet from time immemorial they have been treated as competent testimony . . .").

The specific intent required by *Giles* is similarly inconsistent with analogous criminal law forfeiture rules. For example, under the law of self-defense, courts have ruled that initial aggressors lose the protections of self-defense.<sup>227</sup> According to some courts, this rule applies even where the initial aggressor does not intend consequences as severe as death or serious injury; to these courts, the aggressor's generally wrongful acts are enough to forfeit his self-defense claim.<sup>228</sup> The Model Penal Code's justification, or choice-of-evils, defense contains a similar forfeiture restriction. Under this provision, when an actor recklessly or negligently brings about the situation that creates the actor's choice, the actor may not then invoke the choice-of-evils defense.<sup>229</sup>

By analogy, being an equitable doctrine grounded in general notions of culpability (such as the broadly-phrased maxim that no one shall be permitted to take advantage of his own wrong), the forfeiture exception should only require similar evidence of general wrongdoing. As was implicit in the California Court of Appeal's ruling,<sup>230</sup> a defendant's *general wrongful intent* directed toward the would-be witness should suffice.<sup>231</sup> In short, an equitable doctrine grounded in very general notions of culpability should be triggered by similarly general evidence of ill intent.

### III. THE POTENTIAL NARROWING OF *GILES*

With courts now unable to apply the forfeiture doctrine in future cases where the equities demand it but where intent evidence is scarce, this Part examines the two primary methods by which lower

---

<sup>227</sup> Where a defendant responds to an attack upon his life with deadly force, the defendant loses the right to claim self-defense if he initially provoked the incident. *See, e.g., United States v. Peterson*, 483 F.2d 1222, 1223 (D.C. Cir. 1973) ("The right of homicidal self-defense is granted only to those free from fault in the difficulty; it is denied to slayers who incite the fatal attack, encourage the fatal quarrel or otherwise promote the necessitous occasion for taking life."); *id.* at 1237 ("The right of self-defense . . . cannot be claimed by the aggressor in an affray so long as he retains that unmitigated role. It logically follows that any rule of no-retreat which may protect an innocent victim of the affray would, like other incidents of a forfeited right of self-defense, be unavailable to the party who provokes or stimulates the conflict.").

<sup>228</sup> *See* MODEL PENAL CODE § 3.04 cmt. (1985) ("This conclusion [adopted by the Model Penal Code]—that an initial aggressor is accountable for his original unlawful use of force but not for his defense against a disproportionate return of force by his victim—is surely not unreasonable on its face. There is, however, much authority, both common law and statutory, demanding that a person claiming self-defense be free from fault in bringing on the difficulty.").

<sup>229</sup> *See* MODEL PENAL CODE § 3.02(2). Note that this restriction only applies in a prosecution for any offense for which recklessness or negligence suffices to establish culpability.

<sup>230</sup> *See supra* notes 76–79 and accompanying text.

<sup>231</sup> *See supra* notes 157–161 and accompanying text (describing a similar argument advanced by Justice Breyer).

courts will avoid *Giles*'s grasp, thereby achieving what some courts will deem an equitable result: (a) easing prosecutors' burden of proving the intent required by *Giles*; and (b) broadening the definition of "non-testimonial."

### *A. Evading Giles through Proof of the Requisite Intent*

While *Crawford* and *Davis* conceded that forfeiture could trump confrontation rights when properly proven, these decisions did not resolve exactly what quantum of evidence is required to trigger a finding of forfeiture.<sup>232</sup> *Giles* similarly did not address the manner in which its requisite intent must be proven. Neither did these decisions resolve critical procedural questions, such as the applicable burden of proof, nor whether wrongdoing may be established by the very uncontroverted statements sought to be admitted.<sup>233</sup> These are significant constitutional questions that remain open after *Giles*.<sup>234</sup>

In this section, I examine six methods by which lower courts post-*Giles* could make it easier for prosecutors to prove the intent required by *Giles*. These methods include: (1) lowering the burden of proof from clear and convincing to preponderance of the evidence; (2) inferring intent from circumstantial evidence, including evidence from prior incidents not involving the would-be witness; (3) transferring intent from one wrongdoer to another under complicity principles; (4) shifting the burden of proof from prosecution to defense; (5) permitting use of the disputed hearsay in the very hearing used for determining the requisite intent; and (6) requiring only evidence of a partial intent to silence the would-be witness.

#### *1. Lowering Burden of Proof*

Most state and federal courts that have considered forfeiture claims have applied a preponderance standard when determining whether the requisite intent exists.<sup>235</sup> On the strength of this precedent,

---

<sup>232</sup> See *People v. Giles*, 152 P.3d 433, 448 n.1 (Cal. 2007) (Werdegar, J., concurring), cert. granted, 128 S. Ct. 976 (2008), vacated, 128 S. Ct. 2678 (2008).

<sup>233</sup> See *id.* at 448 n.1 & 2.

<sup>234</sup> See *Davis v. Washington*, 547 U.S. 813, 833 (2006) (suggesting, but not deciding, that if a hearing on forfeiture is required, hearsay evidence—including the unavailable witness's out-of-court statements—may be considered in deciding whether the accused forfeited his confrontation rights).

<sup>235</sup> See *Vasquez v. People*, 173 P.3d 1099, 1105 (Colo. 2007) (en banc); see also *United States v. Cherry*, 217 F.3d 811, 820 (10th Cir. 2000) (noting that Confrontation Clause rights may be waived if specific criteria are established through a preponderance of the evidence); *United States v. Houlihan*, 92 F.3d 1271, 1280 (1st Cir. 1996) (discussing basis for selecting preponderance standard over clear and convincing standard); *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982) ("We see no reason to impose upon the government more than the

Federal Rule of Evidence 804(b)(6) also utilizes the preponderance standard.<sup>236</sup> However, some courts have applied the far more demanding clear and convincing standard.<sup>237</sup> Because the United States Supreme Court has yet to resolve this issue,<sup>238</sup> lower courts post-*Giles* are free to adopt whichever standard they prefer.

*United States v. Mastrangelo*,<sup>239</sup> in which the prosecution's key witness was killed while on his way to court to testify,<sup>240</sup> illustrates how a court's selection of the governing standard can dictate its resolution of the forfeiture claim.<sup>241</sup> *Mastrangelo* is particularly helpful to the instant analysis, as it applied each standard in the same case, reaching opposite outcomes.

In *Mastrangelo*, the defendant was charged along with eleven co-defendants with crimes stemming from the importation of large amounts of marijuana and methaqualone tablets.<sup>242</sup> The only evidence connecting Mastrangelo to the drug conspiracy was evidence of his purchase of four trucks seized by federal agents while loaded with the

---

usual burden of proof by a preponderance of the evidence where waiver by misconduct is concerned."); *United States v. Mayhew*, 380 F. Supp. 2d 961, 968 (S.D. Ohio 2005) ("[E]quitable considerations demand that a defendant forfeits his Confrontation Clause rights if the court determines by a preponderance of the evidence that the declarant is unable to testify because the defendant intentionally murdered her, regardless of whether the defendant is standing trial for the identical crime that caused the declarant's unavailability."); *State v. Gettings*, 769 P.2d 25, 29 (Kan. 1989) (holding that the burden of proving that the defendant procured the absence of the witness is upon the State by a preponderance of the evidence); *Commonwealth v. Edwards*, 830 N.E.2d 158, 172 (Mass. 2005) (discussing that the issue of the standard of proof has been considered and that a preponderance standard is required).

<sup>236</sup> See FED. R. EVID. 804, Notes of Advisory Committee on Rules, 1997 Amendments.

<sup>237</sup> See, e.g., *United States v. Thevis*, 665 F.2d 616, 631 (5th Cir. Unit B 1982) (applying the clear and convincing standard). The preponderance of the evidence standard equates to a mere finding of "more probable than not." The preponderance standard "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" *In re Winship*, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (quoting *F. JAMES, CIVIL PROCEDURE* 250-51 (1965)). By contrast, the clear and convincing standard requires a distinctly higher degree of certainty than the preponderance standard. See *United States v. Mastrangelo*, 561 F. Supp. 1114, 1120 (E.D.N.Y. 1983), *aff'd*, 722 F.2d 13 (2d Cir. 1983); see also *Hobson v. Eaton*, 399 F.2d 781, 784 n.2 (6th Cir. 1968); 30 AM. JUR. 2D *Evidence* § 1167 (1964).

<sup>238</sup> See *Davis*, 547 U.S. at 833 ("We take no position on the standards necessary to demonstrate such forfeiture, but federal [and state] courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance-of-the-evidence standard.").

<sup>239</sup> 693 F.2d 269 (2d Cir. 1982).

<sup>240</sup> *Id.* at 271, 273-74 (remanding for evidentiary hearing on the defendant's involvement in the death of a witness who was killed on his way to court to testify against defendant).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 270.

drugs.<sup>243</sup> The sole witness to Mastrangelo's purchase of the trucks, James Bennett, was murdered.<sup>244</sup>

In April 1979, Bennett testified before a grand jury that he sold Mastrangelo the trucks under suspicious circumstances.<sup>245</sup> He also identified a tape recording of a conversation with Mastrangelo, in which Mastrangelo made threatening statements to Bennett seemingly intended to deter Bennett from identifying Mastrangelo as the purchaser.<sup>246</sup> Two years later, Bennett was shot dead in the street while on his way to court to testify in Mastrangelo's trial.<sup>247</sup> The trial judge declared a mistrial as to Mastrangelo, and the Second Circuit Court of Appeals affirmed.<sup>248</sup>

Prior to the start of Mastrangelo's second trial, the Government moved for admission of Bennett's grand jury testimony pursuant to the residual exception to the hearsay rule set forth in Federal Rule of Evidence 804(b)(5). Invoking the Confrontation Clause, Mastrangelo opposed the motion.<sup>249</sup> The trial judge admitted the evidence, reasoning that Mastrangelo was implicated in Bennett's murder and had therefore waived his confrontation right.<sup>250</sup> On the strength of Bennett's grand jury testimony, Mastrangelo was convicted of various drug related charges,<sup>251</sup> and was sentenced to nine years imprisonment.<sup>252</sup>

Mastrangelo then appealed the admission of Bennett's grand jury testimony.<sup>253</sup> After affirming the rule of waiver by misconduct,<sup>254</sup> the Second Circuit remanded for an evidentiary hearing on the issue of whether Mastrangelo was, in fact, involved in Bennett's murder.<sup>255</sup> Before remanding, the Second Circuit provided guidance on this determination.<sup>256</sup> Adopting a rather liberal method of proving intent-to-silence, the court declared that if Mastrangelo "was in fact involved in the death of [the witness] through knowledge, complicity, planning or in any other way, [the trial court] must hold his objections

---

<sup>243</sup> *Id.* at 271.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *See id.* (setting forth relevant portions of recording).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 271-72.

<sup>249</sup> *Id.* at 272.

<sup>250</sup> *Id.*

<sup>251</sup> *United States v. Mastrangelo*, 561 F. Supp. 1114, 1115 (E.D.N.Y. 1983), *aff'd*, 722 F.2d 13 (2d Cir. 1983).

<sup>252</sup> *Id.*

<sup>253</sup> *Mastrangelo*, 693 F.2d at 270.

<sup>254</sup> *See id.* at 272-73 (citing cases applying the waiver by misconduct doctrine).

<sup>255</sup> *Id.* at 273-74.

<sup>256</sup> *See United States v. Cherry*, 217 F.3d 811, 818 ("*United States v. Mastrangelo* adopted a broad definition of imputed waiver." (citation omitted)).

to the use of [the witness's] testimony waived."<sup>257</sup> The Second Circuit ruled that "bare knowledge of the plot" plus a "failure to warn" authorities alone would sufficiently implicate Mastrangelo,<sup>258</sup> and that proof of such "bare knowledge" need only be shown by a preponderance of the evidence.<sup>259</sup> With these guidelines in place, the Second Circuit then took the unusual step of requesting the lower court's analysis of Mastrangelo's involvement under both the clear and convincing and preponderance of the evidence standards.<sup>260</sup>

On remand, the United States District Court for the Eastern District of New York found the evidence sufficient, under the preponderance standard, to find that Mastrangelo had prior knowledge of the murder plot and failed to warn appropriate authorities.<sup>261</sup> The court reached the opposite outcome under the clear and convincing standard.<sup>262</sup>

At the evidentiary hearing, the court heard testimony from three individuals: (1) Joseph Bennett, the nephew of the murdered witness who was a participant in the federal witness protection program and who had a substantial criminal record; (2) Nicholas Berardi, who met Mastrangelo in prison, and was also a participant in the federal witness protection program with a substantial criminal record; and (3) Assistant United States Attorney Walter Mack, who testified as to his prior interview of Berardi.<sup>263</sup>

In essence, Joseph Bennett testified that, in a meeting with the defendant, Mastrangelo relayed his concern that James Bennett would testify against him, and that Mastrangelo seemed determined to

---

<sup>257</sup> *Mastrangelo*, 693 F.2d at 273.

<sup>258</sup> *See id.* at 273–74 ("Bare knowledge of a plot to kill [the witness] and a failure to give warning to appropriate authorities is sufficient to constitute a waiver.").

<sup>259</sup> *Id.* at 273. In justifying its selection of the preponderance standard, the *Mastrangelo* court reasoned:

We see no reason to impose upon the government more than the usual burden of proof by a preponderance of the evidence where waiver by misconduct is concerned. Such a claim of waiver is not one which is either unusually subject to deception or disfavored by the law. To the contrary, such misconduct is invariably accompanied by tangible evidence such as the disappearance of the defendant, disruption in the courtroom or the murder of a key witness, and there is hardly any reason to apply a burden of proof which might encourage behavior which strikes at the heart of the system of justice itself.

*Id.* (citation omitted).

<sup>260</sup> *Id.* at 274.

<sup>261</sup> *United States v. Mastrangelo*, 561 F. Supp. 1114, 1115 (E.D.N.Y. 1983), *aff'd*, 722 F.2d 13 (2d Cir. 1983).

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

prevent James Bennett from taking the stand, although he did not divulge any particular plan to do so.<sup>264</sup>

Nicholas Berardi testified that, according to Mastrangelo, the elimination of Bennett was “a necessity.”<sup>265</sup> Berardi, however, also testified that, when interviewed by Walter Mack, he informed Mack that Mastrangelo did *not* know about the murder, and that Mastrangelo may have learned of the phone call after the killing.<sup>266</sup>

Because Mack’s interview notes seemed to confirm Berardi’s latter statements and indicated that Mastrangelo did not know the murder was going to occur, Mack testified that the report “did not comport with [his] recollection of what had been said.”<sup>267</sup> According to Mack, his notes were to be read not to indicate that Mastrangelo was unaware of the murder, but rather that Mastrangelo was unaware of its precise details.<sup>268</sup>

The trial court found the testimony of Bennett and Berardi “generally credible,” but cautioned that both witnesses had substantial criminal records along with “possible motivations for perjury.”<sup>269</sup> Thus, the court concluded that, although no direct evidence was adduced to establish Mastrangelo’s prior knowledge of the murder plot, there was sufficient “circumstantial evidence from which the inference of prior knowledge may be drawn.”<sup>270</sup> Accordingly, the court held that Mastrangelo had waived his confrontation objection through his own wrongdoing under the preponderance standard.<sup>271</sup>

Following the Court of Appeals’ mandate, the court then analyzed the forfeiture issue under the more stringent clear and convincing evidence standard.<sup>272</sup> Noting that the clear and convincing standard requires witnesses to “distinctly remember[.]” the details of their testimony and to narrate those details “exactly and in due order,” the court concluded that the testimony of Bennett and Berardi, although sufficient to support a probability-based finding of prior knowledge, lacked the specificity and precision demanded by the clear and convincing standard.<sup>273</sup> Thus, the court would have reached the opposite outcome under this standard.

---

<sup>264</sup> *Id.* at 1116 (summarizing the testimony of Joseph Bennett).

<sup>265</sup> *Id.* at 1117.

<sup>266</sup> *See id.* at 1116–18 (summarizing the testimony of Nicholas Berardi).

<sup>267</sup> *Id.* at 1118–19 (quoting and summarizing the testimony of Walter Mack).

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 1119.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 1120.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* (quoting 30 AM. JUR. 2D *Evidence* § 1167 (1964)).

As *Mastrangelo* illustrates, a court's selection of the governing standard, as well as the court's view of the type of evidence sufficient to establish intent, may dictate the court's resolution of the forfeiture claim. This is particularly true in conspiracy-related cases, where witnesses such as Bennett and Berardi are not always considered credible.

## 2. Inferring Intent

In some pre-*Giles* cases, the requisite intent-to-silence is simply inferred from circumstantial evidence. The *Mastrangelo* court, for example, relied upon circumstantial evidence to infer the defendant's intent to silence a key government witness.<sup>274</sup> The New Mexico Supreme Court has also ratified the practice of inferring intent, stating that "in some cases, a trial court could simply 'infer' from the evidence presented to it that the defendant intended by his misconduct to prevent the witness from testifying."<sup>275</sup> Inferring intent makes it easier for prosecutors to satisfy *Giles* by eliminating the need to prove actual intent.

In the domestic abuse context, *Giles* indicates both that intent evidence may be inferred and that such evidence may include distant, unrelated interactions between the accused and the would-be witness.<sup>276</sup> In *Giles*, Justices Souter and Ginsburg argued in concurrence that "the element of intention would normally be satisfied by the *intent inferred* on the part of the domestic abuser in the classic abusive relationship."<sup>277</sup> Justice Scalia's majority opinion,

---

<sup>274</sup> *Id.* at 1119 (emphasis added).

<sup>275</sup> *State v. Romero*, 133 P.3d 842, 855 (N.M. Ct. App. 2006), *aff'd*, 156 P.3d 694 (N.M. 2007). The *Romero* court cited *United States v. Dhinsa*, 243 F.3d 635 (2d Cir. 2001), and *United States v. Miller*, 116 F.3d 641 (2d Cir. 1997). See *Romero*, 133 P.3d at 854. In *Dhinsa*, the court upheld, under harmless error analysis, the trial court's application of forfeiture doctrine to the defendant, who was head of a "vast racketeering organization" and was convicted of numerous counts of killing and threatening people who cooperated with police; rather than seeking specific intent evidence, the court simply reviewed the "direct and overwhelming evidence" of Dhinsa's participation in the murders. 243 F.3d at 643, 656–58, 660. In *Miller*, the court applied forfeiture doctrine to a group of defendants involved in "a RICO enterprise conducted through a campaign of violent enforcement and retribution." 116 F.3d at 652, 667–69. See also *State v. Alvarez-Lopez*, 98 P.3d 699, 705 (N.M. 2004) ("It may be sufficient to infer under certain facts that a defendant intended by his misconduct to prevent the witness from testifying. For example, we may be able to infer a criminal defendant's murder of a key prosecution witness was intended to prevent the witness from testifying at the defendant's trial.")

<sup>276</sup> Justice Breyer interpreted this passage in a similar manner, declaring that "the majority . . . ends its opinion by creating a kind of presumption that will transform *purpose* into *knowledge-based intent*—at least where domestic violence is at issue; and that is the area where the problem is most likely to arise." *Giles v. California*, 128 S. Ct. 2678, 2708 (2008) (Breyer, J., dissenting).

<sup>277</sup> *Id.* at 2695 (Souter, J., concurring) (emphasis added).



joined by Chief Justice Roberts and Justices Thomas, Souter, Ginsburg, and Alito, made a similar claim. The majority explained:

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 . . . stop [the victim] from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. *Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry.*<sup>278</sup>

In the above passage, the Court seemingly concedes that the requisite *Giles* intent might be inferred from distant interactions between the defendant and witness, even if the murder itself involves no such intent, and even if those acts occurred long before the murder in question. Even more broadly, Justice Breyer interpreted Justice Souter's reading of this passage in his concurrence to mean "that a showing of domestic abuse is [by itself] sufficient to call into play the protection of the forfeiture rule."<sup>279</sup> According to Justice Breyer, inferring intent "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.'"<sup>280</sup> Thus, by "creating a kind of presumption that will transform *purpose* into *knowledge-based intent* . . . [in] domestic violence [cases,] . . . the area where the problem is most likely to arise[,]"<sup>281</sup> the *Giles* majority significantly undermined its own ruling.

Even before *Giles*, we see this same attenuated intent evidence making the difference in cases beyond domestic abuse. For example, the United States Court of Appeals for the D.C. Circuit recently deemed the intent requirement satisfied by two pieces of circumstantial evidence: testimony based on unsubstantiated rumor, and an alleged threat to individuals not implicated in the forfeiture claim.<sup>282</sup> In similar fashion, a New York federal court found

---

<sup>278</sup> *Id.* at 2693 (majority opinion) (emphasis added).

<sup>279</sup> *Id.* at 2708 (Breyer, J., dissenting).

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *United States v. Martinez*, 476 F.3d 961, 966–67 (D.C. Cir. 2007) (applying the analogous intent requirement of Federal Rule of Evidence 804(b)(6)).

sufficient “*circumstantial evidence* from which the *inference* of prior knowledge may be drawn.”<sup>283</sup> The New Mexico Supreme Court has also ratified the practice of inferring intent, both generally and in the specific context presented in *Giles*.<sup>284</sup> Given *Giles*’s explicit endorsement of this practice in domestic abuse cases, prosecutors will likely invoke this argument in a variety of post-*Giles* cases.

### 3. *Transferring Intent*

Pre-*Giles* decisions further eased prosecutors’ burden of proving intent by ruling that one wrongdoer’s intent may be transferred to another under complicity principles. Thus, in future cases involving accomplice or conspiracy liability, we can expect prosecutors to pursue this method of argument when *Giles* is invoked.

*United States v. Cherry*<sup>285</sup> is illustrative. In *Cherry*, five individuals were charged with involvement in a drug conspiracy: Joshua Price, Michelle Cherry, LaDonna Gibbs, Teresa Price, and Sonya Parker.<sup>286</sup> Much of the evidence relied upon by the government came from a cooperating witness, Ebon Sekou Lurks, who was murdered just prior to trial.<sup>287</sup> At trial, the government moved to admit Lurks’s out-of-court statements, pursuant to Federal Rule of Evidence 804(b)(6), on wrongful procurement grounds.<sup>288</sup> Upon a careful review, the district court held that Joshua Price procured the absence of Lurks, making the statements admissible against him.<sup>289</sup> “It held, however, that there was . . . ‘absolutely no evidence [that Cherry, Gibbs, and Parker] had actual knowledge of, agreed to or participated in the murder of . . . Lurks.’”<sup>290</sup> The court thus upheld these defendants’ confrontation objections and severed Joshua’s case from the others.

The government appealed and the Tenth Circuit reversed, holding that co-conspirators can be deemed to have waived confrontation and hearsay objections based on actions that are in furtherance, within the scope, and reasonably foreseeable as a necessary or natural

---

<sup>283</sup> *United States v. Mastrangelo*, 561 F. Supp. 1114, 1119 (E.D.N.Y. 1983) (emphasis added), *aff’d*, 722 F.2d 13 (2d Cir. 1983).

<sup>284</sup> See *State v. Alvarez-Lopez*, 98 P.3d 699, 705 (N.M. 2004) (“[W]e may be able to infer a criminal defendant’s murder of a key prosecution witness was intended to prevent the witness from testifying at the defendant’s trial.”); see also *State v. Romero*, 133 P.3d 853, 855–56 (N.M. Ct. App. 2006), *aff’d*, 156 P.3d 694 (N.M. 2007).

<sup>285</sup> 217 F.3d 811 (10th Cir. 2000).

<sup>286</sup> *Id.* at 813.

<sup>287</sup> *Id.* at 814.

<sup>288</sup> *Id.* at 813.

<sup>289</sup> *Id.* at 814.

<sup>290</sup> *Id.* (quoting *United States v. Price*, No. CR-98-10-S, order at 17 (E.D. Okla. Jan. 14, 1999)) (alteration and second omission in original).

consequence of an ongoing conspiracy.<sup>291</sup> Turning to Federal Rule of Evidence 804(b)(6), the court reasoned that the provision's use of the words "engaged or acquiesced in wrongdoing" indicates that waiver can be imputed under an agency theory to a defendant who "acquiesced" in procuring a witness's unavailability but did not actually "engage[]" in wrongdoing apart from the conspiracy itself.<sup>292</sup>

In regards to *Pinkerton* liability,<sup>293</sup> the court declared that "[f]ailure to consider *Pinkerton* conspiratorial responsibility [would] afford[] too much weight to Confrontation Clause values in balancing those values against the importance of preventing witness tampering,"<sup>294</sup> and that "a *Pinkerton* theory strikes a better balance between the conflicting principles at stake."<sup>295</sup> The court thus remanded the case for findings on the *Pinkerton* factors as they related to Lurks's murder.<sup>296</sup>

Cases like *Cherry*, while admittedly supported by the language of Rule 804(b)(6), are significant in that they signal a willingness to transfer the requisite *Giles* intent from one defendant to another.

#### 4. Shifting Burden of Proof to Party Asserting Confrontation Right

Invoking *Reynolds*, courts could shift the burden to the accused to prove that he did *not* intend to "keep the witness away" from the trial. This type of burden-shifting finds support in *Reynolds*.

<sup>291</sup> *Id.* at 813.

<sup>292</sup> *Id.* at 815 (quoting FED. R. EVID. 804(b)(6)).

<sup>293</sup> Under *Pinkerton v. United States*, 328 U.S. 640 (1946), each conspirator may generally be held liable for the crimes of all other co-conspirators if two requirements are met: (1) the crimes were committed in furtherance of the objectives of the conspiracy; and (2) the crimes were a natural and probable consequence of the conspiracy. Under *Pinkerton*, evidence of direct participation in the commission of the substantive offense is not required. See *Pinkerton*, 328 U.S. at 645–48.

<sup>294</sup> *Cherry*, 217 F.3d at 820 (citing *United States v. Balano*, 618 F.2d 624 (10th Cir. 1979)).

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 821. Before closing, the court addressed the effect of the district court's finding that "'there is absolutely no evidence' that defendants Cherry, Gibbs, and Parker (although not Teresa Price) 'had actual knowledge of, agreed to or participated in the murder of Ebon Sekou Lurks.'" *Id.* (quoting *United States v. Cherry*, No. CR-98-10-S, order at 17 (E.D. Okla. Jan. 14, 1999)). According to the court, this finding, while not clearly erroneous, does not foreclose the possibility of waiver under a *Pinkerton* theory. *Id.* "Actual knowledge is not required for conspiratorial waiver by misconduct if the elements of *Pinkerton*—scope, furtherance, and reasonable foreseeability as a necessary or natural consequence—are satisfied." *Id.* On the scope issue, the court noted "that the scope of the conspiracy is not necessarily limited to a primary goal—such as bank robbery—but can also include secondary goals relevant to the evasion of apprehension and prosecution for that goal—such as escape, or, by analogy, obstruction of justice." *Id.*

In *Reynolds*, the accused was on trial for bigamy, and the absent witness was his alleged second wife.<sup>297</sup> When officers went to the Reynolds home to subpoena the witness, the accused repeatedly informed the officers that the witness was not home, and “that she [would] not appear in this case.”<sup>298</sup> Unable to locate Mrs. Reynolds prior to trial, the court admitted her testimony from a previous trial for the same offense.<sup>299</sup> Upon review of Reynolds’s confrontation objection, the Supreme Court upheld the trial court’s action.<sup>300</sup> The Court’s reasoning is instructive. The Court declared:

The accused was himself personally present in court when the showing was made, *and had full opportunity to account for the absence of the witness*, if he would, or to deny under oath that he had kept her away. *Clearly, enough had been proven to cast the burden upon him of showing that he had not been instrumental in concealing or keeping the witness away.* Having the means of making the necessary explanation, and having every inducement to do so if he would, the presumption is that he considered it better to rely upon the weakness of the case made against him than to attempt to develop the strength of his own.<sup>301</sup>

The *Reynolds* Court contemplated shifting the burden from the government to the accused where evidence suggests the accused *may have* prevented the witness from testifying against him. Under this approach, once an inference of intent-to-silence is established, a court applying *Giles* could then require the defendant to present evidence negating that inference.

The *Reynolds* opinion does not clearly indicate the precise circumstances that caused the Court to place the burden on the accused. The Court presumably believed the accused knew the whereabouts of his second wife, but simply chose to withhold that information so as to profit from his wife’s absence. This situation is quite different from that in *Giles*, where the witness is known to be dead and the only question left open is the precise reason for her killing. Thus, it seems *Reynolds*’s burden-shifting approach might be confined to cases involving witnesses who turn up missing just prior to their scheduled court date, and where the defendant has an obvious

---

<sup>297</sup> *Reynolds v. United States*, 98 U.S. 145, 146–48 (1878).

<sup>298</sup> *Id.* at 148–50.

<sup>299</sup> *Id.* at 150.

<sup>300</sup> *Id.* at 160.

<sup>301</sup> *Id.* at 160 (emphasis added).

motive to prevent the testimony. Either way, the thrust of the decision indicates that not all cases require evidence of actual intent, and that courts may sometimes presume the ill intent required by *Giles*.

### 5. Using the Challenged Hearsay to Prove Forfeiture

If a hearing on forfeiture is required, federal courts generally permit the prosecution to rely on the challenged hearsay evidence to prove forfeiture.<sup>302</sup> However, some courts have explicitly refused to do so,<sup>303</sup> and others have remained openly undecided.<sup>304</sup>

The general rule permitting reliance upon hearsay at the forfeiture hearing is grounded in federal evidence rules and in regular pre-trial motion practice. For example, Federal Rule of Evidence 104(a) declares that courts, in making determinations on the admissibility of evidence “[are] not bound by the rules of evidence except those with respect to privileges.”<sup>305</sup> Because a judge brings considerable experience to bear on the issue of how much weight to give the evidence, and because preliminary determinations must be made speedily without unnecessary duplication at trial, the judge generally has discretion to admit reliable hearsay evidence at such hearings.<sup>306</sup> Given this well-recognized authority, we can expect courts in future forfeiture hearings to admit hearsay evidence in analyzing intent issues under *Giles*.

### 6. Partial Intent Sufficient

Most courts considering forfeiture claims have held that proof of a partial intent is sufficient, implicitly recognizing that people often commit acts with multiple motives. For example, the New Mexico Supreme Court in *State v. Alvarez-Lopez*<sup>307</sup> declared that “[t]he State ‘need not . . . show that [Defendant’s] sole motivation was to procure

---

<sup>302</sup> See *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982) (ruling that hearsay evidence, including the grand jury testimony the government sought to introduce under the forfeiture doctrine, is admissible in a hearing to determine whether defendant waived his confrontation rights); see also *United States v. Emery*, 186 F.3d 921, 927 (8th Cir. 1999) (“inclined to doubt” that wrongful procurement must be proven independently of the challenged hearsay).

<sup>303</sup> See, e.g., *People v. Giles*, 152 P.3d 433, 446 (Cal. 2007) (“[A] trial court cannot make a forfeiture finding based solely on the unavailable witness’s uncontroverted testimony; there must be independent corroborative evidence that supports the forfeiture finding.”), cert. granted, 128 S. Ct. 976 (2008), vacated, 128 S. Ct. 2678 (2008).

<sup>304</sup> See, e.g., *United States v. White*, 116 F.3d 903, 914 (D.C. Cir. 1997) (holding that at least partial reliance on hearsay is permissible, but leaving “for another day the issue of whether a forfeiture finding could rest solely on hearsay”).

<sup>305</sup> FED. R. EVID. 104(a).

<sup>306</sup> *White*, 116 F.3d at 914.

<sup>307</sup> 98 P.3d 699 (N.M. 2004).

the declarant's absence; rather, it need only show that the defendant "was motivated *in part* by a desire to silence the witness."<sup>308</sup>

The Court of Appeal for the District of Columbia explained the basis for this rule in *United States v. Martinez*,<sup>309</sup> in which the defendant argued that the would-be witness was killed out of retaliation for his involvement with the police rather than to silence him in the event of a future trial.<sup>310</sup> The court reasoned that "Martinez's argument is based on a false either-or dichotomy."<sup>311</sup> According to the court, "[i]t is surely reasonable to conclude that anyone who murders an informant does so intending *both* to exact revenge *and* to prevent the informant from disclosing further information and testifying. The two purposes often go hand-in-glove, and this case is just another good example."<sup>312</sup>

### *B. Broadening the Scope of Non-Testimonial Hearsay*

Along with easing the burden of proving the requisite *Giles* intent, courts will likely avoid *Giles*'s reach by broadening the scope of "non-testimonial" hearsay.

The Confrontation Clause applies only to testimonial hearsay.<sup>313</sup> In *Giles*, Justices Thomas and Alito expressed doubt as to whether the out-of-court statements in that case were actually "testimonial."<sup>314</sup> With the addition of the three dissenting Justices, had the issue been properly preserved for appeal, a majority of Justices would have likely<sup>315</sup> deemed the Confrontation Clause not offended by admission of Avie's statements on these grounds.<sup>316</sup> Moreover, Justices Thomas

---

<sup>308</sup> *Id.* at 704–05 (quoting *United States v. Dhinsa*, 243 F.3d 635, 654 (2d Cir. 2001)); see also *United States v. Houlihan*, 92 F.3d 1271, 1279 (1st Cir. 1996) (sole motivation not required, motivation in part is sufficient); *Vasquez v. People*, 173 P.3d 1099, 1104–05 (Colo. 2007) (en banc) (reaffirming the court's earlier rule that preventing the witness's testimony does not have to be the defendant's sole motivation, but need only be one reason for the defendant's actions).

<sup>309</sup> 476 F.3d 961 (D.C. Cir. 2007), *cert denied*, 128 S. Ct. 420 (2007).

<sup>310</sup> *Id.* at 966.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* (citation omitted).

<sup>313</sup> See *Davis v. Washington*, 547 U.S. 813, 823–26 (2006) (answering affirmatively the question of "whether the Confrontation Clause applies only to testimonial hearsay").

<sup>314</sup> See *Giles v. California*, 128 S. Ct. 2678, 2693–94 (2008) (Thomas, J., concurring); *id.* at 2694 (Alito, J., concurring).

<sup>315</sup> The three dissenting Justices in *Giles* do not clearly indicate how they would have ruled on this issue. On this question, the dissent merely states: "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. With that understanding, we ask whether the defendant, through his wrongdoing, has forfeited his Confrontation Clause right." *Id.* at 2695 (Breyer, J., dissenting).

<sup>316</sup> See *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (exempting non-testimonial statements from Confrontation Clause scrutiny altogether).

and Alito each signaled a strong preference for restricting the confrontation right through the “testimonial” gateway, rather than through expansion of the forfeiture doctrine.<sup>317</sup> As such, future prosecutors will likely respond to confrontation claims in this manner.<sup>318</sup>

The Supreme Court has yet to define the term “testimonial,” leaving its precise contours for future courts to define. The *Crawford* Court explicitly refused to define the term, declaring:

We leave for another day any effort to spell out a comprehensive definition of “testimonial.” Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.<sup>319</sup>

While *Crawford* failed to provide a precise definition of the term “testimonial,”<sup>320</sup> it did declare that “testimony” typically involves “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”<sup>321</sup> According to the Court, “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”<sup>322</sup> This “core class” of statements includes the following three categories of statements:

---

<sup>317</sup> See *Giles*, 128 S. Ct. at 2693–94 (Thomas, J., concurring); *id.* at 2694 (Alito, J., concurring).

<sup>318</sup> See Lininger, *supra* note 189, at 766–67 (reporting that among the approximately 500 federal and state court opinions applying *Crawford* between March 8, 2004, and December 31, 2004, nearly one-third of the courts reaching the merits distinguished *Crawford* on the ground that the statement in question is not testimonial, and many of these courts applied the *Roberts* framework instead).

<sup>319</sup> *Crawford*, 541 U.S. at 68 (footnote omitted).

<sup>320</sup> “The Sixth Amendment’s Confrontation Clause provides that, ‘[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.’” *Id.* at 42 (quoting U.S. CONST. amend. VI) (alteration and omission in original). The *Crawford* Court made clear that the protections of the Confrontation Clause, by its terms, are limited to those statements that are made by “witnesses’ against the accused.” *Id.* at 51. As such, the confrontation requirement does not apply to statements made by those not categorized as a “witness,” itself a rather ambiguous term. According to the Court, “[o]ne could plausibly read ‘witnesses against’ a defendant to mean those who actually testify at trial, those whose statements are offered at trial, or something in-between.” *Id.* at 42–43 (citations omitted). Later, the Court explained that “‘witnesses’ against the accused [are] those who ‘bear testimony.’” *Id.* at 51 (quoting 2 WEBSTER, *supra* note 104). Thus, the scope of the term “witnesses against” is defined by the scope of the term “testimony,” hence the battle over the precise meaning of “testimonial.”

<sup>321</sup> *Id.* (quoting 2 WEBSTER, *supra* note 104) (alteration in original).

<sup>322</sup> *Id.*

[1] “ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,” [2] “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,” [3] “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”<sup>323</sup>

On the other end of the spectrum are “non-testimonial” statements. The *Crawford* Court portrayed this type of statement as “[a]n off-hand, overheard remark,” “a casual remark to an acquaintance,” or “business records or statements in furtherance of a conspiracy.”<sup>324</sup>

In subsequent decisions, including *Davis v. Washington*,<sup>325</sup> the Supreme Court has retained its position that it would not define the term “testimonial” beyond its three broad formulations above.<sup>326</sup> The Court has, however, provided helpful clarification in the context of police interrogations.<sup>327</sup> The *Crawford* Court noted that most statements offered up in police interrogations would be “testimonial,” as such statements generally resemble the examinations conducted by the justices of the peace in England that prompted the Confrontation Clause’s enactment.<sup>328</sup> But in *Davis* the Court clarified that “[s]tatements 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.”<sup>329</sup> By contrast, such statements are testimonial when there is no such ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.<sup>330</sup>

---

<sup>323</sup> *Id.* at 51–52 (citations omitted); see also *State v. Jensen*, 727 N.W.2d 518, 525 (Wis. 2007) (summarizing the various formulations the Supreme Court mentioned in *Crawford*).

<sup>324</sup> *Crawford*, 541 U.S. at 51, 56.

<sup>325</sup> 547 U.S. 813 (2006).

<sup>326</sup> *Id.* at 823.

<sup>327</sup> See *Crawford*, 541 U.S. at 52.

<sup>328</sup> *Id.* (“Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive.” (first emphasis added)).

<sup>329</sup> See *Davis*, 547 U.S. at 822.

<sup>330</sup> *Id.*



While *Davis* further clarified the distinction between testimonial and non-testimonial statements (at least in the context of police interrogations), there is still a great deal of ambiguity in these two terms.<sup>331</sup> Further, *Giles* appears to signal the Court's desire to define the scope of the confrontation right in this manner rather than through expanding its exceptions. A Sixth Circuit case decided prior to the Court's *Giles* decision, *United States v. Garcia-Meza*,<sup>332</sup> exemplifies the type of case where we can expect courts to resolve the confrontation claim through the testimonial gateway. *Garcia-Meza*, in particular, stands out as a case where the equities point toward admission of the out-of-court testimony, but where another method for admitting the evidence would be needed in a post-*Giles* world.

In *Garcia-Meza*, the defendant, Severo Garcia-Meza, was convicted of murdering his wife, Kathleen Floyd Garcia.<sup>333</sup> According to the Sixth Circuit, around one o'clock in the morning on February 22, 2002, the defendant, Kathleen, and two of Kathleen's female family members (Chelsie and Rosie Johnson) went to Gaspar Nunez's home, who was a friend of the defendant's.<sup>334</sup> The group drank beer for a few hours before Kathleen and the defendant began to fight.<sup>335</sup> The defendant became angry that Kathleen had danced with Nunez's roommate.<sup>336</sup> The defendant then grabbed Kathleen by the hair and wrestled her to the floor.<sup>337</sup>

Kathleen, Chelsie, and Rosie then left the premises and drove back to Linda Holt's house.<sup>338</sup> When Kathleen arrived at Linda's house, "Kathleen and her sister went to Linda's bedroom[,] . . . [where Kathleen] found her mother and her other sister, Calleen."<sup>339</sup> Shortly thereafter, the defendant burst through the front door of the Holt home, waking Calleen's boyfriend, Josh King.<sup>340</sup> According to King, the "[d]efendant went straight to Linda Holt's bedroom."<sup>341</sup> When the defendant reached the bedroom, "he tried to lure Kathleen out of the

---

<sup>331</sup> See, e.g., *State v. Manuel*, 697 N.W.2d 811, 822 (Wis. 2005) (expressing reluctance to accept defendant's invitation to choose among the three *Crawford* formulations as the proper test for measuring whether a statement is testimonial, and reserving for another day whether all three of the *Crawford* formulations, or perhaps an entirely different formulation, would become its rule); see also *Davis*, 547 U.S. at 822 (explicitly not "attempting to produce an exhaustive classification of all conceivable statements . . . as either testimonial or nontestimonial").

<sup>332</sup> 403 F.3d 364 (6th Cir. 2005).

<sup>333</sup> *Id.* at 365–66.

<sup>334</sup> *Id.* at 366.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at 367.

<sup>341</sup> *Id.*

house.<sup>342</sup> When she refused, the defendant grabbed Kathleen's arm with one hand, and reached back with his other and plunged a steak-knife into Kathleen's chest. She died shortly thereafter.<sup>343</sup>

The defendant's confrontation claim centered on evidence presented from an incident of domestic abuse that occurred five months prior to the murder.<sup>344</sup> On September 9, 2001, the defendant reported to police that Kathleen had intentionally damaged their van.<sup>345</sup> When officers arrived, they found Kathleen about to slash the van's tires. The officers then noticed that Kathleen had a bruised cheek and jaw.<sup>346</sup> Kathleen told the officers the defendant had hit her. Later that day, police received a second call from the same residence.<sup>347</sup> At trial, over the defendant's objection,

[t]he officers testified that [Kathleen] had a tennis ball size welt on her jaw, numerous cuts and bruises on her face and leg, blood on her clothes, and complained of pain in her face, back and ribs. Kathleen told the officers that the Defendant cornered her in a bathroom, repeatedly punched her and threatened to kill her.<sup>348</sup>

Kathleen also stated "the [d]efendant had beaten her because she had talked to a former boyfriend earlier in the day."<sup>349</sup> After admitting this testimony, the trial court instructed the jury that this evidence was to be considered to prove motive, intent, and capacity to commit murder.<sup>350</sup>

At trial, the defendant admitted he was responsible for Kathleen's death, but claimed he was not guilty of first degree murder since he was too intoxicated to have formed the required premeditation.<sup>351</sup> The jury rejected this defense and found the defendant guilty of first degree murder.<sup>352</sup> On appeal, the defendant argued that his Sixth Amendment right to confrontation was violated when the district court allowed the officers to testify that the defendant had beaten up the victim because he was angry that she had been talking to a former

---

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 365–66.

boyfriend.<sup>353</sup> Defendant argued that Kathleen's statements were testimonial because they were given to police officers during an ongoing criminal investigation.<sup>354</sup> The government, on the other hand, argued that the statements were not testimonial since they were excited utterances not elicited from structured police questioning.<sup>355</sup> Rather than resolving the case on this ground, the court instead ruled that defendant had forfeited his right to confront Kathleen, and declared:

We need not decide today . . . whether a victim's excited utterance made to an investigating police officer is testimonial, for the Defendant has forfeited his right to confront Kathleen because his wrongdoing is responsible for her unavailability.<sup>356</sup>

In rejecting defendant's confrontation claim, the court reasoned that because "there is no doubt that the [d]efendant is responsible for Kathleen's unavailability . . . he has forfeited his right to confront her."<sup>357</sup> Before closing, the court rejected what later became the intent requirement adopted in *Giles*.<sup>358</sup>

Of course, had this case been decided post-*Giles*, this opinion would have read much differently. Although we can only speculate as to how the Sixth Circuit would have ruled in a post-*Giles* world, we do know the court could have chosen one of the following options: (a) upon review of the record, finding the defendant did (or did not) kill his wife with the requisite intent; (b) remanding the case for the trial court to determine the issue of intent; or (c) finding the statements

---

<sup>353</sup> *Id.* at 366.

<sup>354</sup> *Id.*

<sup>355</sup> While *Davis* and *Hammon* had yet to be decided at the time of this appeal, today we know that the *Davis-Hammon* framework would govern the issue of whether Kathleen's September 9 statements would be deemed testimonial. That test requires courts to examine "the primary purpose of the [police] interrogation" and to determine whether it was intended "to enable police assistance to meet an ongoing emergency" or instead to establish or prove past events potentially relevant to later criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 822 (2006). It would seem that Kathleen's first set of statements could be deemed non-testimonial, while her follow-up phone conversation could not. In the first event, officers arrived at the home during an actual incident, as Kathleen was about to slash the tires of the van. *Garcia-Meza*, 403 F.3d at 367. In the second conversation, however, Kathleen simply called to report an incident of abuse occurring earlier that day. *Id.*

<sup>356</sup> *Garcia-Meza*, 403 F.3d at 370.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.* at 370–71 ("The Supreme Court's recent affirmation of the 'essentially equitable grounds' for the rule of forfeiture strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive. The Defendant, regardless of whether he intended to prevent the witness from testifying against him or not, would benefit through his own wrongdoing if such a witness's statements could not be used against him, which the rule of forfeiture, based on principles of equity, does not permit.").

non-testimonial, and therefore admissible. Given the heinous nature of the defendant's crime, and given his admission to the killing, my thought is that the court would have sought a similar outcome even post-*Giles*<sup>359</sup>—option (c) would have given the court that ability. Further, a majority of the *Giles* Justices would be likely to affirm that result.

#### CONCLUSION

The rather rigid *Crawford* requirements created a need for broad exceptions to its rule, and the Supreme Court in both *Crawford* and *Davis* explicitly ratified the forfeiture by wrongdoing doctrine as such an exception. Acting pursuant to these endorsements, lower courts post-*Crawford* expanded the reach of the forfeiture doctrine. One of the common methods employed by those courts was to reject an intent-to-silence requirement. However, just three years after *Crawford*, the Supreme Court in *Giles* uprooted these decisions by reading an intent requirement into the forfeiture rule.

The need for a stronger, not weaker, forfeiture doctrine remains in *Crawford*'s wake. Being an equitable concept, the forfeiture doctrine will sometimes counsel toward admission of the disputed hearsay despite no evidence of intent-to-silence. This is true regardless of the perceived scope of the forfeiture doctrine at the time of the founding. Accordingly, we can expect many post-*Giles* courts to circumvent the *Giles* rule by one of two methods. First, prosecutors will advocate easier means of proving the requisite intent, such as inferring intent from circumstantial evidence or shifting the burden of disproving intent to the accused. Second, prosecutors will seek to broaden the definition of "non-testimonial" in order to remove the evidence from *Crawford*'s reach. Given the frequency by which lower courts employed these methods before *Giles*, and given the *Giles* Court's admitted responsiveness to these two types of claims, these arguments should prove successful.

---

<sup>359</sup> Also, by rejecting the appellant's argument that the statement's prejudicial effect outweighed its probative value, the *Garcia-Meza* court arguably signaled an underlying desire to uphold the admission of these hearsay statements.

