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Does an Accused Forfeit the Confrontation Right by Murdering a Witness, Absent a Purpose to Render Her Unavailable?

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Case at a Glance

Dwayne Giles killed his former girlfriend but claimed self-defense. The state introduced a statement she made after a prior incident and contends that by killing the speaker, Giles forfeited the right to require exclusion of the statement because he could not "be confronted with" her and cross-examine her. Giles contends that he cannot have forfeited the right absent proof that he killed her for the purpose of rendering her unavailable as a witness. Now the Court will determine whether Giles should be deemed to have forfeited his rights under the Sixth Amendment.

SIXTH AMENDMENT

Does an Accused Forfeit the Confrontation Right by Murdering a Witness, Absent a Purpose to Render Her Unavailable?

by Richard D. Friedman

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ISSUE

If an accused murdered a witness, should he be deemed to have forfeited the right under the Sixth Amendment "to be confronted with" the witness, absent proof that the accused committed the murder for the purpose of rendering her unavailable as a witness?

FACTS

The State of California charged Dwayne Giles with the murder of his former girlfriend, Brenda Avie. There is no doubt that Giles shot Avie to death, but Giles contends that he did so in self-defense. At trial, the prosecution introduced, over Giles's objection, a statement made to the police by Avie after an earlier incident, several weeks before the fatal shooting. That statement asserted that Giles had assaulted her, choking her with his hand, punching her, and threatening her with a knife. The prosecution offered the statement to prove Giles's propensity for domestic violence, a permissible purpose in some cases under California Evidence Code § 1109. The trial court held that the statement satisfied California Evidence Code § 1370, which provides a hearsay exception for certain statements in which a declarant who is unavailable to testify at trial describes the infliction or threat of physical injury upon her. Giles was convicted.

While his case was on appeal, the United States Supreme Court issued its decision in *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* fundamentally transformed the understanding of the Confrontation Clause of the Sixth Amendment, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." Under the previous doctrine, the clause provided only rather limp resistance to admission of most out-of-court statements; if the statement was deemed "reliable," it would usually be deemed to satisfy the clause. But under *Crawford*, if an out-of-court state-

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ment is deemed "testimonial" in nature—so that the person who made it was acting as a witness—then it generally cannot be admitted against an accused unless the witness is unavailable and the accused has had, or will have, an opportunity to cross-examine her. A determination that the statement is reliable, either because it fits within a hearsay exception thought to define a category of reliable statements or because of case-specific considerations, cannot substitute for an opportunity for confrontation. Avie's statement, accusing Giles of a serious crime and made to the police after the initial emergency had passed, was plainly testimonial in nature; this has been made clear by the Court's decision in *Hammon v. Indiana,* decided together with *Davis v. Washington,* 547 U.S. 813 (2006). Moreover, Giles had no opportunity to cross-examine Avie. Accordingly, he contended that admission of Avie's statement violated his right under the Confrontation Clause.

The state responded that Giles forfeited the confrontation right with respect to Avie by killing her without justification and so rendering her unavailable by his own wrongful conduct. *Crawford* explicitly endorsed "the rule of forfeiture by wrongdoing," which, it said, "extinguishes confrontation claims on essentially equitable grounds" rather than on the basis of reliability. An illustration of forfeiture is a case in which an accused, knowing that a witness is about to testify against him at trial, murders her to prevent her from doing so. If the state then offers at trial a prior testimonial statement made by the same witness, the accused plainly should not be allowed to keep the statement out of evidence on the ground that he has not had an opportunity to be confronted with the witness. Cases dating back at least to the 17th century have established this principle—not only in the core case of murder but also in cases in which the accused has concealed or kidnapped or intimidated the witness.

But there is a difference, which according to Giles is crucial, between his case and the hypothetical one presented here: In the hypothetical case, but not in *Giles,* the accused murdered the witness *for the purpose* of rendering the witness unavailable to testify at trial against him. Such a purpose, Giles contends, is essential for the forfeiture doctrine to apply. The California Court of Appeal disagreed, and so did the California Supreme Court. And so Giles petitioned for certiorari, raising the question whether a purpose to render the witness unavailable is necessary for forfeiture of the confrontation right. Because the lower courts are in conflict on this issue, the Court granted the writ.

Case Analysis

At the outset, it is important to clear away one issue that concerns many people when they hear about the possibility of forfeiture in a case like *Giles.* Given that the principal issue in the case is whether Giles killed Avie without justification, is it circular, or does it violate the presumption of innocence, to base a holding that he forfeited his confrontation right on a finding that he killed her without justification? The answer is negative.

It is the role of the jury to find the facts necessary for determining guilt on the merits. But the trial court also has fact-finding functions to perform; it must find the facts necessary for determining whether the accused forfeited the confrontation right. In a case such as *Giles,* the identical factual proposition—whether the accused killed the victim without justification—is critical both to guilt on the merits and to forfeiture. But that does not pose either a theoretical or a practical problem. The jury determines the truth of that proposition for one purpose, and the judge for the other. They apply different standards of persuasion—of course, the stringent "proof beyond a reasonable doubt" standard applies to guilt on the merits, while most courts apply the "preponderance of the evidence" standard to forfeiture, though some have applied the "clear and convincing evidence" test. They operate on different bodies of evidence—in most systems, the trial judge may consider any nonprivileged evidence in deciding a preliminary fact.

And if the judge does make the factual findings necessary to support a conclusion of forfeiture, he or she does not announce to the jury, "Ladies and gentlemen, you should know that the reason you have heard this statement by the victim is that I have determined as a preliminary matter that the accused murdered her. Of course, you shouldn't let my decision on that point affect you in performing the job assigned to you." The situation is closely analogous to the one that arises routinely when the prosecution in a conspiracy case offers a statement on the basis that it fits within the hearsay exemption for conspirator statements, Fed. R. Evid. 801(d)(2)(E). In determining whether the exemption applies, the court must determine whether the accused and the declarant were members of a conspiracy—and almost always that is the same conspiracy being charged.

The argument made by Giles, then, is not that it is circular, or that it violates the presumption of innocence, to base forfeiture on the same crime being charged. But his argument would in fact preclude forfeiture in most cases in which the

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wrongdoing that allegedly rendered the witness unavailable is the same wrongdoing with which the accused is charged. Giles contends that, *even assuming* he killed Avie without justification, he did so "for purely personal reasons" rather than for the purpose of rendering her unavailable as a witness, and that therefore the forfeiture doctrine cannot apply. The state does not suggest that he did kill her for the purpose of rendering her unavailable as a witness; thus, issue is joined on the question of whether such a purpose is essential for application of forfeiture.

Giles is supported by an amicus brief by the National Association of Criminal Defense Lawyers (NACDL). The state is supported by numerous amici. The attorneys general of 37 states have submitted one brief. Five other briefs have been submitted by various organizations and one individual, with particular interest in domestic violence, child abuse, and victims' rights. And the author of the present preview—who submitted an amicus brief in support of the petition, because he believes the question posed by the case is a significant one and the case is a good vehicle for resolving it—has submitted another brief supporting the state.

The two sides disagree across a range of issues. They differ, for example, in their interpretation of language from *Davis,* in a brief passage on forfeiture that the Court included to demonstrate that the problem of witness intimidation could be addressed without unduly narrowing the category of "testimonial" statements. The Court said that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." The parties disagree over whether the verb "obtains" is satisfied by showing merely that the accused's misconduct resulted in the witness's absence. Giles contends that it implies misconduct directed towards that end.

Given that the discussion in *Davis* was rather cursory and essentially *dictum,* or at most addressed to a matter peripheral to the central focus of the case, parsing of its language will not likely be dispositive. More significant will probably be equitable considerations; as noted above, *Crawford* places forfeiture on "essentially equitable" grounds. Giles contends that, absent a purpose to render the witness unavailable, the equitable force for concluding that the accused has forfeited the confrontation right, one of the central rights protecting criminal defendants, is missing; if and only if the accused *has* acted with such a purpose, then he has willfully tampered with the criminal justice system. The state-side participants take the view that if the accused has murdered the witness, there is ample equitable basis for concluding that he has forfeited the right to object to introduction of her prior testimonial statement on the basis that he has not had an opportunity to "be confronted" with her; he has not had that opportunity because he killed her without justification, and he has no legitimate basis to complain about the consequences of his own wrongdoing. Addressing a broader context, the state suggests that the same result would apply in the case of any serious misconduct that has the foreseeable consequence of rendering the witness unavailable.

The possibility of such broader application raises a concern emphasized on the petitioner's side—that a doctrine allowing forfeiture absent a purpose to render the witness unavailable is vulnerable to significant abuse. The state-side response is that the possibility of abuse should be addressed with care in future cases as the forfeiture doctrine develops, not to preclude application of the doctrine in a case that clearly warrants it.

Much of the focus of Giles and of the NACDL is on history from the era surrounding 1791, when the Sixth Amendment was adopted. They contend that there were two distinct, limited doctrines, neither of which called for application of forfeiture in a case like this. First was the traditional doctrine covering "dying declarations": A statement made by a dying victim, aware of the imminence of death, could be admitted in a homicide prosecution because the prospect of immediate death was thought to be a powerful guarantor of trustworthiness. (*Crawford* preserves the possibility that this exception, though reliability-based, survives, sui generis, on historical grounds.) This doctrine obviously does not apply because there was no immediate prospect of death when Avie made her statement. The second doctrine was what today is called forfeiture, but it was historically limited to cases of witness tampering—that is, cases in which the accused purposely rendered the witness unavailable to testify. The petitioner and the NACDL argue that if forfeiture could have been applied absent such a purpose, there would have been no need for the distinct "dying declaration" exception.

There are various state-side responses. One response is to point out that the maxim on which forfeiture was grounded, "that no one shall be permitted to profit from his own wrong," is broad enough to cover this case and has been part of the common law since long before the framing of the Sixth Amendment. Another is to note the apparent absence in the framing era of cases fitting the mold of the present one—

that is, in which the ultimate victim made a testimonial statement *before* the fatal assault. The principal reason for this appears to be that such a case necessarily involves a continuing relationship between perpetrator and victim, and nonlethal domestic violence was hardly ever prosecuted in that era, so there would be no occasion for a statement like Avie's.

In his amicus brief, the present author also contends that the "dying declaration" cases were in reality, even though not in stated rationale, instances of forfeiture. He points out that it was routine practice in the framing era to take the deposition of a dying victim—and if the accused was not present the deposition ordinarily could not be admitted. Only if the victim was aware that death was imminent would the absence of the accused be excused. The author regards this doctrine as effectively marking out the historical bounds of the state's obligation, if it wishes to invoke forfeiture doctrine, to preserve the confrontation right to the extent reasonably possible: if the victim is aware that she is about to die, that is a pretty good indication that it is no longer feasible or humane to hold a deposition in which she confronts the accused.

SIGNIFICANCE

Giles is likely to be highly significant at three levels.

First, given that domestic violence is now a significant focus of prosecutorial efforts, and that repeated domestic violence sometimes culminates in murder, cases fitting the *Giles* pattern now arise with some frequency. That is, after a nonfatal incident, a complainant makes a testimonial statement, not subject to confrontation, to the authorities, and she is then murdered, allegedly by the same assailant. In a variation, the ultimate victim makes a statement to a confidante or in a letter to the effect that if she dies an identified person (the one ultimately accused) should be suspected of murder. If Giles wins, the Confrontation Clause will likely bar use of the statements in either type of case because usually it will appear that the accused committed the murder for what Giles calls "personal" reasons rather than to render the victim unavailable as a witness.

Second, this is the first post-*Crawford* case that centers on forfeiture, and so the decision will probably be important in shaping the doctrine and in determining its reach beyond murder cases. If Giles wins, forfeiture doctrine will not be applicable in the many cases in which (1) a complainant makes a testimonial statement accusing the ultimate defendant of domestic violence, (2) she is later intimidated from testifying at trial, (3) the accused did not make any explicit threats or engage in any other conduct primarily aimed at preventing her from testifying, but (4) intimidation is a foreseeable consequence of his wrongful conduct. If the state wins in *Giles*, such cases will pose a host of knotty questions: Was the wrongful conduct sufficiently serious to permit the possibility of forfeiture? Was intimidation a foreseeable consequence of the wrongful conduct? Has the state acted reasonably to preserve the confrontation right to the extent reasonably possible—such as by exploring the possibility that the complainant would be able to testify subject to cross-examination if not in the actual physical presence of the accused? This last consideration—the extent of the state's responsibility to act reasonably to ensure that the consequences of the forfeiture are not broader than necessary—may be essential to developing a sound doctrine of forfeiture.

Finally, the case may have a significant impact on the broader theory of the Confrontation Clause. If Giles wins, then forfeiture doctrine will not be broad enough to reach most classic "dying declaration" cases. But it is generally accepted that such statements must be admissible, and so the Court would almost certainly recognize a sui generis reliability-based exception for such cases. Furthermore, in many cases—such as those involving the "If anything happens to me ... " type of statement—courts would feel a strong temptation, given that forfeiture doctrine could not reach them, to employ an unduly narrow conception of what is "testimonial," thus removing the case from Confrontation Clause scrutiny altogether. That temptation would not exist if the Supreme Court holds that a purpose to render the witness unavailable is not necessary for forfeiture. And if the Court also indicates that the state must take reasonable steps to preserve the confrontation right to the extent possible, even in the case of a victim who may eventually die as the result of the assault, it could prevent abuse of forfeiture doctrine—and also account for the "dying declaration" cases even while holding that there are *no* reliability-based exceptions to the Confrontation Clause.

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Amicus Briefs

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