# TIPS FOR PROSECUTORS ON FORFEITURE BY WRONGDOING IN LIGHT OF GILES v. CALIFORNIA

by

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## EXECUTIVE SUMMARY

**Giles Decision is Unfavorable on the Surface.**

- The basic ruling holds that a defendant may exclude past hearsay statements pursuant to his right to confrontation, *unless* he killed her with the intent to silence her testimony.

**BUT: A Majority of Justices Hold that a History of Domestic Violence is Sufficient to Demonstrate the Intent to Silence Required for Forfeiture of the Confrontation Right.**

- A majority of Justices (5) hold that a history of "classic abuse" involving typical silencing and isolating behavior is sufficient to establish the intent to silence required to demonstrate forfeiture of the confrontation right.

- Even the lead opinion (Scalia, J.) acknowledges that a history of domestic violence involving silencing and isolating is "highly relevant" to a forfeiture inquiry.

**ALSO: Two-Five Justices Are Seeking to Narrow the Definition of "Testimonial" and the Universe of Statements Subject to the Confrontation Right.**

**Key Tips for Prosecutors:**

- **Gather all available information showing a history of abuse, *particularly past intent to silence or isolate* the victim**
- **Request pretrial forfeiture hearings to demonstrate forfeiture of confrontation right and admissibility of victim's past statements**
- **Do not concede that past statements are testimonial**

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[1] The author spearheaded an *amicus* brief in *Giles* on behalf of the Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) and others, with the assistance of *pro bono* attorneys at Bingham McCutchen LLP, as well as Legal Momentum and the California Partnership to End Domestic Violence.

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## Introduction

While the *Giles* decision[2] sounds like a major loss for prosecutors of homicide and domestic violence, a closer look indicates that it offers a great deal of support for admission of testimonial statements made by the victim in at least - but probably not only – domestic violence and homicide cases. This memo summarizes crucial holdings of various majorities of the Court, and provides tips for demonstrating that the defendant has forfeited his confrontation rights, thereby removing the constitutional objection to admissible hearsay.

It should be noted that the doctrine of forfeiture by wrongdoing has been repeatedly endorsed by the high Court as applying to any criminal prosecution, not only homicide cases. *See Crawford v. Washington,* 541 U.S. 36, 62 (2004)("the rule of forfeiture by wrongdoing… extinguishes confrontation claims on essentially equitable grounds"); *Davis v. Washington,* 547 U.S. 813, 833 (2006)("one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation"). The analysis herein also may apply to any domestic violence prosecution, not only those involving homicide. However, in non-homicide cases the prosecution must demonstrate that a defendant's past abuse "caused" the victim's absence from trial. In a homicide (self-defense) case that element is automatically met.

## I. A MAJORITY of JUSTICES VIEW THESE PAST STATEMENTS AS CONSTITUTIONALLY ADMISSIBLE

The question in *Giles v California* was whether a victim's prior statements to the police regarding defendant's threats to kill her were admissible in a prosecution of that defendant for her killing. The core ruling in *Giles* which has discouraged prosecutors is the holding that a defendant does not forfeit his confrontation right "merely" by killing the witness, but must also "intend" to silence her by the killing. However, a majority of Justices tempered this ruling in significant ways:

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[2] *Giles v. California,* 128 S. Ct. 678 (2008)

- 7 Justices treat a history of domestic violence before the homicide as indicative of the "intent to silence" required for forfeiture
- 5 Justices treat a history of "a classic abusive relationship" as giving rise to a *presumption* of forfeiture, and
- 5 Justices now question whether informal statements to police should even be treated as testimonial (the predicate for application of the confrontation right)

**A. History of Domestic Violence As Sufficient to Demonstrate Forfeiture**

**Domestic Violence is "highly relevant" to Forfeiture (6 Justices):**
"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 . . . " 128 S.Ct. at 2693.

- Justices Scalia and Roberts' lead opinion, joined by 4 concurring Justices

**Classic Domestic Violence Establishes a Presumption of Forfeiture (this opinion creates Scalia's majority):**
"The historical record … simply does not focus on what should be required for forfeiture when the crime charged occurred in an abusive relationship or was its culminating act; today's understanding of domestic abuse had no apparent significance at the time of the Framing, and there is no early example of the forfeiture rule operating in that circumstance.. . . the element of intention would *normally be satisfied* by the intent *inferred* on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process." 128 S.Ct. at2695 [emphasis added].

- Justices Souter and Ginsburg's concurring opinion, endorsed by three dissenters

"[The Souter Concurrence ] seems to say that a showing of domestic abuse is sufficient to call into play the protection of the forfeiture rule in a trial for murder of the domestic abuse victim. . . I agree with this formulation…" 128 S.Ct. at 2708.

- Justices Breyer, Stevens and Kennedy's dissent, making *a majority of* 5 for Souter's "presumption**"** of forfeiture in domestic violence cases

**B. 2 - 5 Justices Seek to Narrow the Definition of "Testimonial"**

"I adhere to my view that statements like those made by the victim in this case do not implicate the Confrontation Clause.. . . [because] "the police questioning was not 'a formalized dialogue' . . . "

- Thomas Concurrence, 128 S.Ct. at 2693

"like Justice Thomas, I am not convinced that the out-of-court statement at issue here fell within the Confrontation Clause in the first place."

- Alito Concurrence, 128 S.C.t at 2694

"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."

- Breyer, Stevens and Kennedy dissent, 128 S.C.t at 2695

## II. TIPS FOR PROSECUTORS

There are several good guidelines for prosecutors to be drawn from these opinions. The following is a set of basic guidelines:

### 1. Do not Concede that Informal Statements to Police are "Testimonial"

Do not concede that statements are testimonial unless they are part of a "formalized dialogue" such as a police station interrogation or sworn statement. Five Justices appear to be seeking to revisit the *Washington v Davis*[3] standard which treats statements made to police at the scene – after an incident is over - as testimonial.

Of course, you must also know your state's case law, some of which may be helpful. Even if your state's cases seem to foreclose a claim that informal statements to police are non-testimonial, you must preserve the argument in order for it to be brought back to the Supreme Court. Given the five Justices' signals in *Giles*, a prosecutor can ethically offer a "good faith argument" for changing the state's existing law. When the issue is brought back up to the Supreme Court, there is a realistic possibility that a majority of the Court will back off of its holding in *Davis.* In fact, the outcome in *Giles* itself would have been different, with five Justices voting for affirmance, had the testimonial issue been preserved.

### 2. Never Concede that Statements to People other than Law Enforcement are Testimonial

Scalia's opinion also states, in *dicta,* that "[s]tatements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment" are non-testimonial and therefore, "would be excluded, if at all, only by hearsay rules." 128 S.Ct. at 2693. Again, your state's case law may foreclose some of these things, but this statement should entitle you to argue for re-opening the question.

### 3. Collect Information Up Front for Potential Forfeiture Hearing

The very first time the State (police or prosecutors) speaks to the victim, it is critical to document the history of abuse, and the suspect's efforts to *silence the victim.* Such an inquiry should cover the history of

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[3] *Davis v. Washington*, 547 U.S. 813 (2006)

- Physical violence
- Threats of physical violence, and
- Power and Control behaviors

*with particular emphasis on*

- Retaliation for disclosing abuse
- Threats of retaliation for disclosing abuse
- Forcing the victim to hide bruises and other signs of abuse in public
- Telling her not to scream
- Isolating behaviors (cutting her off from social or legal support, including friends, job, etc), or
- Any other indication the abuser restricted her ability to disclose the abuse or get help

Keep in mind that *pretrial forfeiture hearings typically permit hearsay*. Do not screen out any information just because it may not be admissible evidence. Gather all *information* that is relevant – and seek to offer it at a pretrial forfeiture hearing.

3. **Where Necessary, call an Expert Witness at Forfeiture Hearing**

In some cases, e.g., where there is insufficient evidence of silencing or isolating behaviors, an expert witness at the pretrial hearing may support the case for forfeiture. Such an expert could testify about what is known about the parties' history and the extent to which that relationship qualifies as the "classic abuse" relationship referenced in *Giles.* Such an expert should focus on how what is known about the parties' relationship is consistent with a "silencing" and intimidating effect on the victim. In non-homicide cases the expert could link that history to the victim's absence from the prosecution.

4. **Non-Domestic Violence Cases**

While the Court's opinions refer specifically to domestic violence, the analysis used by several of the Justices regarding finding an "intent to silence" in a "classic abuse" history is eminently transferable to a number of other types of cases where a "culture of silence" makes witnesses reluctant to testify. Such cases include gang cases, mafia cases, and drug cases. Any case where witnesses are fearful of cooperating with the State based on a *history* of intimidating relationships, ought to benefit from the "history of silencing" analysis in *Giles.*

**Conclusion**

The Giles opinions give prosecutors a lot to work with. What is required is a proactive strategy whereby the State gathers the information to support a forfeiture case from the outset. Where the case is compelling and information about the history of silencing behaviors in the abusive relationship is lacking, the State should consider calling an expert witness to make the case that what *is* known about the relationship is sufficient to demonstrate a "classic abuse" relationship as referenced by seven Justices in *Giles.*