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Giles, The Confrontation Clause, and Inferred Intent: Do Abusers Forfeit Their Confrontation Rights by Engaging in Domestic Violence?

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GILES, THE CONFRONTATION CLAUSE, AND INFERRED INTENT: DO ABUSERS FORFEIT THEIR CONFRONTATION RIGHTS BY ENGAGING IN DOMESTIC VIOLENCE?

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ABSTRACT

This Prosecuting those accused of domestic violence presents an array of challenges for prosecutors. These crimes are frequently a he-said, she-said situation with minimal physical evidence. This puts a heavy weight on victim testimony in order to obtain a conviction. Unfortunately, many victims refuse to testify at the outset, agree to testify then change their minds, or do not show up for the court date. Without that testimony, prosecutors will often drop the charges against an accused, possibly putting the victim at risk of another episode of violence.

Justice Scalia opened the door to the possibility of a prosecutor being able to use out-of-court statements made by the victim, without the victim's testimony at trial. Such statements would typically be inadmissible hearsay, but in Giles v. California Justice Scalia stated that past episodes of domestic abuse could create a situation where a defendant has forfeited his right to confront the witness at trial. If a prosecutor can establish that the abuser has, by the very nature of the abuse, intended to keep the victim from cooperating with the investigation or prosecution, a forfeiture argument is possible. If granted, any and all relevant statements the abuser made to the victim could be used against him without requiring the victim to testify. The results would be more convictions and, more importantly, removing the victim from a dangerous situation.

INTRODUCTION

The United States Constitution grants a criminal defendant the right to confront witnesses against him at trial.[1] However, the United States Supreme Court recognized an exception to this right when a defendant causes the witness to be absent from court. In *Giles v. California,* Justice Antonin Scalia states that courts must find the criminal defendant *intended* to prevent a witness from testifying in order to make a finding of forfeiture by wrongdoing.[2] Dicta from *Giles*, and a concurring opinion authored by Justice David Souter, state that past crimes of domestic violence are highly relevant in analyzing a forfeiture argument.[3] By their nature, such crimes are often intended to isolate the victim and prevent her from seeking outside

[1] U.S. CONST. amend. VI (granting the right "to be confronted with the witnesses against him").

[2] Giles v. California, 554 U.S. 353, 361 (2008) (emphasis added).

[3] *See Giles*, 554 U.S. at 379–80.

help.[4] The emotional and psychological impact of domestic violence illustrates that by engaging in domestic violence the abuser has sufficient control over the victim to prevent her from testifying as a witness.[5] This comment argues that by engaging in domestic violence, a criminal defendant possesses the inferred intent to prevent the victim from testifying, thus triggering forfeiture by wrongdoing. Further, for prosecuting these crimes, a finding of forfeiture would allow the admission of various statements made by victims that might otherwise be inadmissible hearsay. A victim's statements of past abuse would serve as crucial evidence for an evidence-based prosecution if the victim is unavailable as a witness at the trial.[6]

Part I of this paper outlines the holding in *Giles v. California* and analyzes the *inferred intent* dicta from *Giles*, as well as Justice Souter's concurring opinion. Part II discusses the emotional and psychological effects of domestic violence to support the notion that an abuser exerts sufficient control over a victim to impact her will to seek outside help, and thus, triggering forfeiture. Part III includes examples of how courts have interpreted the dicta from *Giles*. Finally, this comment concludes by restating my argument that an abuser forfeits his confrontation right by engaging in domestic violence and causing its subsequent impact on victim-witnesses.

I. THE *GILES* HOLDING AND DICTA

A. The Giles Decision

The defendant in *Giles* was convicted of first-degree murder of his former girlfriend, Brenda Avie.[7] At trial, the prosecution sought to introduce statements that Avie made to a police officer responding to a domestic violence call three weeks prior to her murder.[8] She told the responding officer that Giles had picked her up and choked her.[9] She further explained to the officer that when Giles released her, he punched her and threatened her with

[4] *Id*. at 380. I recognize that victims of domestic violence can be both male and female, but this paper uses "she" for the victim and "he" for the abuser because the overwhelming majority of victims are women.

[5] *See infra* Part II.

[6] *See* FED. R. EVID. 804(b)(6).

[7] *Giles*, 554 U.S. at 356–57.

[8] *Id*. at 356.

[9] *Id*. at 356–57.

a knife.[10] The statements were admitted at trial over defense counsel's objections.[11]

The trial court admitted the statements because they related to 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."[12] The California Court of Appeals and California Supreme Court affirmed.[13] The U.S. Supreme Court granted certiorari to consider whether a defendant's Sixth Amendment right under the Confrontation Clause is forfeited when the witness cannot appear at trial due to the actions of the defendant.[14]

The Supreme Court reiterated two exceptions to the Sixth Amendment's Confrontation Clause: statements made near death,[15] and statements made by a witness who was detained or made unavailable by the defendant.[16] The Court held that Avie's statements did not fall into the dying declaration category because they were made three weeks before her murder.[17] The Court then focused its analysis on the witness's absence resulting from the defendant's wrongdoing. The majority opinion discusses prior cases and treatises finding forfeiture in conduct designed to prevent the witness from testifying, the defendant's means and contrivances kept the witness away, or the defendant's scheme to prevent the witness from testifying.[18] The Court simplifies this as the prosecution must prove beyond a preponderance of the evidence "that the defendant *intended* to prevent a witness from testifying" in order for forfeiture to apply.[19]

The Court held the victim's statements inadmissible because the state did not prove the defendant engaged in wrongdoing (namely, choking and punching the victim) for the purpose of procuring the victim's silence; that is, the design, purpose, or scheme was lacking.[20]

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[10] *Id*. at 357.

[11] *Id*.

[12] *Giles*, 554 U.S. at 357; *see also* Ohio v. Roberts, 448 U.S. 56, 65–68 (1980) (referring to the "indicia of reliability" and illustrating the difficult nature of Confrontation Clause jurisprudence (citing Mancusi v. Stubbs, 408 U.S. 204, 213 (1972) (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)))).

[13] *Giles*, 554 U.S. at 357.

[14] *See id*. at 357–58.

[15] *See* FED. R. EVID. 804(b)(2); *Giles*, 554 U.S. at 357–58; Mattox v. United States, 146 U.S. 140, 151 (1892).

[16] FED. R. EVID. 804(b)(6); *Giles*, 554 U.S. at 359; Reynolds v. United States, 98 U.S. 145, 158 (1878).

[17] *Giles*, 554 U.S. at 359–60.

[18] *Id*.

[19] *Id*. at 361 (emphasis added).

[20] *Id*. at 377.

However, in dicta, the Court discusses forfeiture in the domestic violence context.[21] Justice Scalia opens the door to the idea that intent to prevent a victim from testifying can be found in domestic violence by the nature of the crime itself.[22] Combined with Justice Souter's concurring opinion (joined by Justice Ruth Bader Ginsburg), the dicta provide an opening, if ever so slight, for the argument that by engaging in acts of domestic violence a defendant pressures the victim not to cooperate with the justice system.[23] This could amount to a finding of forfeiture based on "highly relevant" evidence of past abuse, which is discussed below.[24]

B. Inferred Intent to Prevent Confrontation

Justice Scalia speaks of "inferred intent" in the context of domestic violence that culminates in murder.[25] He writes, "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."[26] Although Justice Souter's concurrence notes that homicide is an "extreme example,"[27] taken together, the dicta and the concurring opinion establish a framework for identifying intent to prevent victim cooperation when analyzing the abusive relationship in a broader context. "Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be *highly relevant* to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify."[28] Here, Justice Scalia is careful to consider "evidence of ongoing criminal proceedings" separately from evidence of "earlier abuse."[29] By separating them in his opinion, Justice Scalia considers evidence of past abuse or threats to suffice as "highly relevant" to the inquiry, even without evidence of an ongoing criminal proceeding. Thus, absent a pending hearing, a defendant may still forfeit his confrontation right. Deborah Tuerkheimer describes this as "pre-arrest" evidence of domestic violence.[30]

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[21] *Id*.
[22] *Giles*, 554 U.S. at 377.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*. at 377 (emphasis added).
[27] *Giles*, 554 U.S. at 379 (Souter, J., concurring).
[28] *Id*. at 377 (majority opinion) (emphasis added).
[29] *Id*. (emphasis added).
[30] Deborah Tuerkheimer, *Forfeiture After Giles: The Relevance of "Domestic Violence Context,"* 13 LEWIS & CLARK L. REV. 711, 723–24 (2009).

Justice Souter also finds intent is necessary and states that past abuse is a road map to the culminating crime.[31] In *Giles*, the culminating crime was murder. Justice Souter writes, "If evidence for admissibility shows a continuing relationship of this sort (abusive, isolating, and controlling), it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed . . . ."[32] Justice Souter also notes that there is nothing from early case law or other material that suggests "any reason to doubt 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 . . . ."[33] Justice Souter defines the "classic abusive relationship" as one "meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process."[34]

Justices Scalia and Souter agree that domestic violence crimes constitute a complex issue for the court when identifying a criminal defendant's intent to silence. They also agree that intent is the primary component of a forfeiture analysis, and evidence of past abuse is "highly relevant."[35] Despite this opinion being in the context of domestic violence culminating in murder, the test for inferring intent is applicable to non-homicide domestic violence as well. "Ironically, *Giles* may make it easier for prosecutors to prove forfeiture when an unavailable victim is alive than when she has been killed by the defendant . . . because in many or even most of these cases, specific evidence connects the defendant's misconduct to the victim's decision not to cooperate."[36] Control, isolation, coercion, physical violence, threats of violence, or any combination of these acts can be present in an abusive relationship, regardless of whether it culminates in homicide. The elements of abusive relationships have profound impacts on the victim's psyche, which would be "highly relevant" when a court is pressed to make a finding of forfeiture. These elements and their effects are discussed in the next section.

II. DOMESTIC VIOLENCE AND ITS IMPACT ON VICTIMS

Violence, threats, and coercion are employed by abusers to control and isolate victims.[37] Through acts of violence, an abuser's threats become increasingly credible and diminish a victim's ability to act with complete au-

[31] *See Giles*, 554 U.S. at 380 (Souter, J., concurring).

[32] *Id*.

[33] *Id*.

[34] *Id*.

[35] *Id*. at 377 (majority opinion), 379–80 (Souter, J., concurring).

[36] Tuerkheimer, *supra* note 30, at 722.

[37] *See* MO. COALITION AGAINST DOMESTIC & SEXUAL VIOLENCE, UNDERSTANDING THE NATURE AND DYNAMICS OF SEXUAL VIOLENCE 1 (2012), https://www.mocadsv.org/FileStream.aspx?FileID=2.

tonomy.[38] This section explores how knowing the psychological effects of domestic violence gives prosecutors a better understanding of domestic violence, and an enhanced ability to argue forfeiture to a judge.

Abusers use violence and threats of violence as a means to control the victim. Courts have defined violence as behaviors ranging from threats of violence to physical assaults to murder.[39] Psychologist Lenore Walker found that repeated incidents of abuse take control away from the victim.[40] "Research shows that, more than any other class of violent criminals, domestic abusers are fueled by a crusade to control their intimate partners—a concept known as the 'control motive.'"[41] As a victim loses control, the abuser can coerce and manipulate outcomes. "The batterer's desire to dominate his victim functions as the animating force behind his abusive behavior."[42]

Recent literature expanded the scope of domestic violence research to the broader category of intimate partner violence to include non-married couples and relationship violence, as well as traditional marriages. Findings still demonstrate the diminished control felt by victims is a recurring theme.[43] The expansion to intimate partner violence reflects the understanding that intimate relationships are dynamic between partners and is a more accurate reflection of how society views intimate partners and intimate partner violence.[44] However, since the introduction of Walker's theory in 1979, the phenomenon of an abuser's control over his victim still remains. "Complying (with an abuser's demands) doesn't necessarily mean that one 'wants' to do what the partner demands; more likely the individual is trying to create safety for oneself and one's children."[45] In fact, "The day-to-day 'rules' imposed by an abusive partner may be those that one becomes accustomed to as a personal risk management strategy—even without recog-

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[38] *See id*. at 4.

[39] *See* State v. Supanchick, 323 P.3d 231, 234 (Or. 2014) (defendant physically and emotionally abused his wife); State v. Baldwin, 794 N.W.2d 769, 771–72 (Wis. 2010) (defendant threatened to "kill her" and "blacken [her] eye"); People v. Banos, 100 Cal. Rptr. 3d 476, 480–81 (2009) (defendant assaulted his ex-girlfriend, and ultimately murdered her).

[40] LENORE E. WALKER, THE BATTERED WOMAN 44–54 (1979) (theorizing that victims of domestic abuse suffer from learned helplessness, becoming passive once they realize their actions will not change or stop the abuse).

[41] Brief for Minouche Kandel et al. as Amici Curiae Supporting the Petitioner at 22–23, People v. Beltran, 56 Cal. 4th 935 (No. S192644) (2013).

[42] Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM L. & CRIMINOLOGY 959, 965 (2004).

[43] *See* Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743–44 (2005).

[44] Tuerkheimer, *supra* note 42, at 1018–19.

[45] Dutton & Goodman, *supra* note 43, at 752.

nizing the extent of compliance."[46]

An abuser lays the foundation for coercion and control by communicating threats backed by corresponding physical violence, if the victim does not act a certain way.[47] Physical violence is not essential for coercion and control, but it does reinforce the credibility of threats made against the victim.[48] When the threats become credible through acts of violence, the abuser gains control at the expense of the victim's control. Maintaining control is a form of coercion, and "coercion can only be maintained if the threat is credible."[49]

Physical abuse is only one aspect of domestic violence. An abuser can use economic abuse, threats, or other forms of violence, to coerce and control the victim.[50] Further, Evan Stark argues that acts of domestic violence are not individual instances in a cycle, but are "part of a larger pattern of ongoing coercion and control."[51] Stark defines coercion as "the use of force or threats to compel or dispel a particular response," and control as "structural forms of deprivation, exploitation, and command that compel obedience indirectly by monopolizing vital resources, *dictating preferred choices . . . limiting her options*, and depriving her of supports needed to *exercise independent judgment*."[52]

Mary Ann Dutton and Lisa Goodman define coercion as "a dynamic process linking a demand with a credible, threatened negative consequence for noncompliance."[53] When credible threats of violence exist, an abuser can use various forms of coercion including increased violence, threats, intimidation, and economic pressure, to name a few. "The cumulative harm of this multifaceted abuse can result in the victim exhibiting low self-esteem, guilt, shame, anger, sadness, unrealistic hope, denial, self-blame, and, especially, fear."[54] The psychological toll faced by victims of domestic violence translates into a loss of autonomy and control, and the abuser uses his power to coerce outcomes that are desirable to him.[55] One such outcome is preventing a victim from testifying against an abuser.

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[46] *Id*.

[47] *See id*. at 752–53.

[48] *See* EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 376 (2007).

[49] LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 37 (2012).

[50] *See* Sarah M. Buel, *Putting Forfeiture to Work*, 43 U.C. DAVIS L. REV. 1295, 1379 (2010).

[51] GOODMARK, *supra* note 39, at 35 (referring to STARK, *supra* note 48).

[52] STARK, *supra* note 48, at 228–29.

[53] Dutton & Goodman, *supra* note 43, at 746–47.

[54] Buel, *supra* note 50, at 1341.

[55] *See id*. at 1342.

Coercion and control can easily be seen when there is a pending legal proceeding but also present absent a legal proceeding.[56] When abuse occurs after a legal proceeding has commenced, specific intent to keep the victim from testifying is readily observable. Deborah Tuerkheimer refers to the timing of this violence as "post-incident conduct."[57] She writes, "The defendant's acts are designed to persuade the victim—by threats or emotional appeals—to change her story, drop charges, absent herself, or otherwise become unavailable as a prosecution witness."[58] An abuser's knowledge of the justice system can also be weaponized against his victim, because he views it as a challenge to his power. "It is not surprising, then, that batterers feel outraged when their crimes are reported to authorities, for then their victims are challenging their absolute power."[59] Sarah Buel found:

> Since the *Crawford-Davis-Giles* rulings, a great number of victims have revealed that their batterers actually explain to them that if they do not appear in court, the case *must* be dismissed. Armed with the knowledge that many courts have opted for dismissal rather than navigating the confusing forfeiture process, offenders are hypermotivated to silence their victims. . . . Most victims thus view the batterer as victor, for he has successfully manipulated the criminal justice system to ensure she cannot utilize it to achieve safety.[60]

Being incarcerated does not mean that abuse stops. Indeed, abusers utilize jail phone calls to pressure victims to refrain from cooperating with law enforcement and prosecutors.[61]

In what Tuerkheimer labels "pre-arrest" violence, there exists a method of inferring intent to silence a victim, absent a legal proceeding. "For instance, assume that in the course of their relationship, but prior to his arrest on current charges, the defendant (as is typical) explicitly threatens to harm the victim if she ever helps put him in jail."[62] Despite a lack of pending legal proceedings, ". . . it would be bizarre to contend that his conduct is any less wrongful simply because it did not occur in anticipation of his arrest in the instant case. And indeed, the Court's decision in *Giles* would seem to allow for a forfeiture finding under these circumstances."[63] "In this relatively large category of cases [when a live victim has been made unavailable for trial], where the primary motivating force is a battered woman's fear of

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[56] *See* Tuerkheimer, *supra* note 30, at 722–24.

[57] *Id*. at 722.

[58] *Id*.

[59] Buel, *supra* note 50, at 1340.

[60] *See id*. at 1331.

[61] People v. Nixon, 53 N.E.3d 301, 305 (Ill. 2016) (explaining that the defendant called friends asking them to pressure witnesses to not testify).

[62] Tuerkheimer, *supra* note 30, at 723.

[63] *Id*. at 724.

future injury, the causation requirement should be readily satisfied."[64] The majority opinion in *Giles* left this avenue open by holding that evidence of earlier abuse and threats is "highly relevant" to a forfeiture proceeding.[65] The standard, whether pre- or post-arrest, remains an *intent* based standard to be proven beyond a preponderance of the evidence.[66] Thus, pending legal proceedings are relevant to the analysis, but not dispositive.

Abusers have an entire toolbox of coercive tools at their disposal once their threats of violence become credible. Intimidation, threats of violence, phone calls from jail, and weaponized knowledge of the judicial system all tip the scales of control in favor of the abuser. Armed with these tools of coercion and control, an abuser can silence or distance his victim from those who would help her attain justice and safety. Whether pre-arrest or post-arrest, a court can hear evidence on the abuser's violence and coercive measures to find that he acted with the requisite intent to keep the victim from court, because the leading case on forfeiture, *Giles*, held that the cornerstone of forfeiture is intent.[67] Intent can be found in an abuser's direct actions and statements, in his conduct throughout an abusive relationship, and in his conduct in the build-up to a legal proceeding. When a court has the opportunity to analyze the totality of abuse as the causation for a victim's absence, it can infer the defendant's intent to keep the victim from testifying against him.

III. APPLYING THE *GILES* DICTA AND CONCURRENCE

As explained above, the guidance from *Giles* instructed courts to focus on a defendant's intent to procure a victim-witness's absence from court.[68] In the domestic violence context, this includes intent inferred from past instances of abuse.[69] Inferred intent can be present in both homicide and non-homicide cases of domestic violence.[70] This section reviews cases that apply the inferred intent principle to show forfeiture of the Sixth Amendment right to confrontation.

In *State v. Supanchick*, the defendant was found to have forfeited his confrontation right.[71] The defendant in this case physically and emotionally

[64] *Id*. at 725.
[65] *Giles*, 554 U.S. at 377.
[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] *See id*.
[70] Tuerkheimer, *supra* note 30, at 722.
[71] *See Supanchick*, 323 P.3d at 233–34.

abused his wife, resulting in a restraining order against him.[72] The wife filed for divorce soon after obtaining the restraining order.[73] Three weeks after his wife filed for divorce, defendant filed for divorce and "devised a plan to persuade his wife to recant the allegations against him, give him custody of their daughter, and leave the state."[74] The defendant's plan included entering his wife's house carrying a loaded shotgun and restraining her with duct tape.[75] The defendant knew he needed to work fast to prevent her from calling 911 and reporting his presence, because he was, among other things, violating the restraining order.[76]

The police were dispatched to the house after the defendant's mother was unable to reach him.[77] After his unsuccessful attempt to persuade his wife to recant, and with the police knocking at the door, the defendant shot and killed his wife.[78] The evidentiary issue for the trial court was the admissibility of the wife's statements made when obtaining the restraining order.[79] The court initially ruled that the statements, taken as a whole, were too general for admissibility, but allowed the prosecutor to identify specific statements relating to prior abuse.[80] These statements included "that defendant had told his wife to 'buy a wooden spoon so that he could beat [her] with it,' that 'he'd already dug the hole for [her] for when he got rid of [her],' and 'that he had threatened to 'slit [her] throat bilaterally.'"[81] The statements were admitted and defendant was found guilty.[82]

The Oregon Supreme Court affirmed the conviction, finding the trial court properly admitted the wife's past statements regarding abuse.[83] The defendant argued on appeal that forfeiture only applied if the defendant's "primary purpose" was preventing a witness from testifying.[84] But the court found that the text of the rule did not create such a requirement, and as such, only one motivating factor needed to be procuring the witness' absence.[85] Citing *Giles*, the court stated, "Acts of domestic violence that cul-

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[72] *Id*. at 234.
[73] *Id*.
[74] *Id*.
[75] *Id*.
[76] *Supanchick*, 323 P.3d at 234.
[77] *Id*.
[78] *Id*. at 234–35.
[79] *Id*. at 235.
[80] *Id*. at 235–36.
[81] *Supanchick*, 232 P.3d at 236.
[82] *Id*. at 233–34.
[83] *Id*. at 234.
[84] *Id*. at 236.
[85] *Id*. at 236–38. The applicable rules of evidence in this case were the Oregon Evidence Code, specifically OR. R. EVID. 804(3)(g).

minate in murder can reflect a complex of motives; limiting forfeiture by wrongdoing to those instances in which the defendant's primary motive or purpose was to make the declarant unavailable would undercut the majority's explanation [in *Giles*] of the ways in which the forfeiture doctrine will apply in domestic violence cases."[86]

Supanchick demonstrates the court's ability to view an abusive relationship in context for forfeiture proceedings. Statements that imply an intent to silence a victim are illustrative to establish a defendant's purpose. The court found evidence of past abuse to be "highly relevant" to the forfeiture proceeding in compliance with *Giles*.[87] Where evidence of intent exists in an abusive relationship, a court should analyze the evidence in the context of the relationship and a finding of forfeiture is possible. It may be unreasonable to draw a bright-line distinction on how far in the past a court must go, but *Giles* does not call for that determination. Where a defendant's purpose or intent can be demonstrated to include preventing his victim from testifying, a court may find forfeiture.

The Superior Court of the Virgin Islands, Division of St. Thomas and St. John in *Virgin Islands v. Toussaint* also found a defendant had forfeited his confrontation rights when his former girlfriend, Tinashei Phillips, had fled to the United States to avoid him.[88] To determine forfeiture, the court held a separate hearing.[89] At issue were statements made by Phillips to Corporal Leroy Francis, a police officer, detailing instances of past domestic violence, including an incident on September 10, 2010.[90] Additional statements by Phillips to the officer included threats made by defendant via text message to Phillips, her son, and her family.[91]

The court reaffirmed that the standard of proof is beyond a preponderance of the evidence.[92] It established the victim had left the Virgin Islands and discarded her cell phone, rendering her unreachable and unavailable.[93] In its forfeiture analysis, the court found that defendant was on notice of Phillips' willingness to work with police following the September 10, 2010, domestic violence incident.[94] From that incident until trial, evidence of the defendant's conduct established his intent to prevent her cooperation.[95] The

[86] *Supanchick*, 232 P.3d at 239.
[87] *Giles*, 554 U.S. at 377.
[88] Virgin Islands v. Toussaint, 55 V.I. 419, 421 (2011).
[89] *Id*.
[90] *Id*.
[91] *Id*. at 421–22.
[92] *Id*. at 423–24.
[93] *Toussaint*, 55 V.I. at 424.
[94] *Id*. at 425.
[95] *Id*. at 426.

court was "mindful of the U.S. Supreme Court's statement in *Giles v. California* that '[a]cts of domestic violence are often intended to dissuade the victim from resorting to outside help . . . to prevent testimony to police officers or cooperation in criminal prosecutions.'"[96] Again, earlier abuse is "highly relevant" to the forfeiture inquiry.[97] The court concluded that Phillips' absence after receiving threats to herself, her son, and her family constituted forfeiture by the defendant.[98]

Toussaint illustrates how courts can find inferred intent in non-homicide cases of domestic violence. Important to note in *Toussaint* is the courts use of a separate hearing. This mechanism for determining forfeiture is beneficial because it gives the court an opportunity to hear all relevant instances of past abuse before a jury is selected, creating a more efficient process for prosecutors to argue forfeiture. More importantly, courts are "permitted to disregard the rules of evidence when making preliminary determinations of facts to reach a decision on the admission of evidence."[99] Allowing a judge to hear all relevant instances of past abuse before ruling on forfeiture gives the prosecution an opportunity to truly flesh out the nature and severity of abuse. In doing this, the prosecution can highlight the effects of the abuse and its likelihood of dissuading the victim from cooperating with police and prosecutors. It also gives the defense an opportunity to argue against forfeiture outside the context of trial, where evidence of past abuse, if heard by the jury, would prejudice the jury against the defendant. Separate forfeiture hearings provide both sides an opportunity to argue separate from the jury, and with the entire focus being on forfeiture.

CONCLUSION

Acts of violence and credible threats keep abusers in a position of power over their victims. In his control lies the inferred intent Justices Scalia and Souter outline in Giles.100 Whether the culminating crime in an abusive relationship is murder, aggravated battery, or any other crime against an intimate partner, evidence of past abuse is a "road map" for judges to follow in determining intent. It can come in the form of threats, physical violence, economic abuse, or other similar acts of control, but they all end in the same place: the abuser's inferred intent to prevent his victim from cooperating with law enforcement and prosecutors.

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[96] *Id*.

[97] *Id*.

[98] *See Toussaint*, 55 V.I. at 426–27.

[99] *Id*. at 425; *see also* FED. R. EVID. 104 cmt. on 104(a).

[100] *Giles*, 554 U.S. at 377.

The complex nature of analyzing the totality of abuse presents challenges but is necessary to determine forfeiture. Difficulties should not act as a bar on seeking justice for the survivors of domestic violence, and courts should not shy away from the opportunity to hear arguments from prosecutors willing to try. An abuser cannot be allowed to profit from his wrongful conduct and avoid the punishment that society deems appropriate. Prosecutors should be aware of and utilize the pre-trial setting to argue forfeiture when the victim is unavailable. As this comment suggests, in an abusive relationship, there is likely to be ample evidence to illustrate the defendant's intent to keep his victim from participating at a trial, which provides the requisite intent needed for a prosecutor to show that a defendant forfeited his right to confront the witness at trial.