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THE PURPOSE-DRIVEN RULE: DREW PETERSON, *GILES V. CALIFORNIA*, AND THE TRANSFERRED INTENT DOCTRINE OF FORFEITURE BY WRONGDOING

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INTRODUCTION

Under the doctrine of forfeiture by wrongdoing, a party who successfully engages in conduct designed to render a prospective witness unavailable at trial forfeits his objection to the admission of hearsay statements made by that witness. Typically, this forfeiture doctrine applies in the witness-tampering context, with a defendant on trial for some crime (e.g., robbery) intentionally procuring the unavailability of a prospective witness against him at *that trial*, resulting in forfeiture. But does the doctrine of forfeiture by wrongdoing then apply at the defendant's trial for the wrongdoing that resulted in the witness's unavailability (e.g., at the defendant's trial for murdering the witness)? In other words, is there a transferred intent doctrine of forfeiture by wrongdoing under which the intent to render a witness unavailable at trial A can transfer to trial B? This essay argues that there is indeed a transferred intent doctrine of forfeiture by wrongdoing.

On September 6, 2012, a jury convicted Drew Peterson of the murder of his third wife, Kathleen Savio.[1] Media accounts of the verdict indicated that jurors were primarily swayed by the admission of hearsay statements by Savio as well as those by Peterson's fourth wife, Stacy Peterson, in a trial that otherwise consisted largely of circumstantial evidence.[2] Numerous stories reported that the prosecution introduced these hearsay

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1. Tina Sfondeles, Dan Rozek & Jon Seidel, Drew Peterson Juror: Hearsay Evidence Did Him In, Chicago Sun-Times (Sept, 6, 2012, 1:00PM), http://www.suntimes.com/news/metro/14977207-418/drew-peterson-jury-judge-what-does-unanimous-mean.html (reporting conviction).

2. Id.

statements pursuant to "Drew's Law," a statutory codification of the common law doctrine of forfeiture by wrongdoing that the Illinois legislature enacted solely for purposes of the Peterson prosecution.[3]

These stories were inaccurate. Ironically, while the Illinois legislature created Drew's Law to make it easier for the Peterson prosecution, that law, codified in 725 ILCS 5/115-10.6, made it more difficult to admit hearsay statements than its common law counterpart.[4] Under both versions, hearsay statements by a declarant are admissible against a party who intended to, and did, procure the unavailability of the declarant at trial, but Drew's Law also requires that the statements be reliable.[5]

In the buildup to the Peterson trial, the Circuit Court, Will County, deemed several of the statements made by Peterson's third and fourth wives inadmissible under Drew's Law because they were insufficiently reliable.[6] The Appellate Court of Illinois, Third District, however, reversed, finding that Drew's Law neither trumped nor supplanted the common law doctrine of forfeiture by wrongdoing, which applied regardless of the reliability of the statements.[7]

Therefore, the court impliedly deemed the subject statements admissible under the transferred intent doctrine of forfeiture by wrongdoing. The doctrine of forfeiture by wrongdoing typically applies in the witness-tampering context: When a defendant on trial for some crime (e.g., robbery) intends to and does procure the unavailability of a prospective witness against him at *that trial*, the prosecution can admit the witness's hearsay statements at *that same trial* (the robbery trial).[8]

But, in the Peterson prosecution, Peterson's alleged killing of Kathleen Savio could not have been for the purpose of rendering her unavailable at the trial for her murder, a trial that could not have existed until *after* Peterson killed her.[9] Instead, the court found that Peterson killed Savio to prevent her from testifying at a future hearing on the distribution of their marital property as a result of their divorce, with that intent then transferring to the murder trial, triggering application of the doctrine.[10] Similarly, while there was some mention of Drew Peterson

3. See, e.g., Examples of Hearsay Statements from Peterson Trial, The Seattle Times (Sept. 6, 2012, 4:04 PM), http://seattletimes.com/html/nationworld/2019086849_apusdrewpetersontrialhearsay.html (stating "[p]rosecutors relied on normally barred secondhand hearsay statements to convict former Illinois police officer Drew Peterson" through application of Drew's Law).

4. People v. Peterson, 968 N.E.2d 204, 211 (Ill. App. 2012).

5. Id.

6. Id. at 209.

7. Id. at 213–14.

8. See, e.g., Monica J. Smith, Article, Goodbye Forfeiture, Hello Waiver: The Effect of *Giles v. California*, 13 Barry L. Rev. 137, 143 (2009) ("From the *Reynolds* case in 1878 until 1985, courts only applied the forfeiture by wrongdoing doctrine to witness tampering.").

9. See generally Giles v. California, 554 U.S. 353, 359–68 (2008) (discussing application of forfeiture by wrongdoing in context of other litigation); see also infra note 25 and accompanying text (supporting transferred intent doctrine in applying forfeiture by wrongdoing to more than one trial).

10. *Peterson*, 968 N.E.2d at 209.

possibly killing Stacy Peterson to prevent her from testifying at the Savio murder trial, inferring such an intent seems unlikely given that Stacy disappeared (and presumably died) two years before police even arrested Drew Peterson for Savio's murder, an arrest largely prompted by Stacy's disappearance.[11] Instead, the court mainly found that Drew Peterson killed Stacy Peterson at least in part for the same reason he killed Savio: to prevent her from testifying at future divorce and property distribution hearings.[12]

Thus, despite media accounts indicating that Peterson's appeal hinges on the constitutionality of "Drew's Law," it in fact hinges upon the constitutionality of the transferred intent doctrine of forfeiture by wrongdoing. And, the following exchange between Justice Antonin Scalia and petitioner's attorney Marilyn Burkhardt in *Giles v. California*[13], the case explicating the common law doctrine of forfeiture by wrongdoing, lends some support to Peterson's case:

> Justice Scalia: I had thought that the common law rule is that you have to have rendered the—intentionally rendered the witness unavailable with regard to the particular trial that's before the court. Not rendering the witness unavailable for some other litigation.
>
> Mr. Burkhardt: That was–
>
> Justice Scalia: Do you know of any case where it was some other litigation that–
>
> Mr. Burkhardt: –No.
>
> Justice Scalia: –I didn't think so.
>
> Mr. Burkhardt: No. That is the common law.[14]

Because Justice Scalia eventually authored the plurality opinion in *Giles*, this exchange could reveal that the Supreme Court rejected the transferred intent doctrine of forfeiture by wrongdoing and, in effect, read the doctrine solely as a witness-tampering rule.

This essay contends, however, that Justice Scalia's plurality opinion and the concurring opinion of Justices Souter and Ginsburg in fact endorsed a transferred intent doctrine of forfeiture by wrongdoing. First, by making the operation of the doctrine dependent upon causation and *intent* rather than causation and *benefit*, the Court allowed for transferred intent principles to apply in the forfeiture context. Second, by analogizing the doctrine to the coconspirator admission rule, the Court impliedly recognized that forfeiture is based upon principles that extend beyond a single trial. Third, by determining that the purpose of the doctrine is protecting the integrity of the trial system, the Court allowed an analogy to

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11. Id.

12. Id. Because neither Drew nor Stacy had yet filed for divorce, this finding by the court could be open to challenge on appeal.

13. 554 U.S. 353.

14. Transcript of Oral Argument at 20, Giles v. California, 554 U.S. 353 (2008) (No. 07-6053) (discussing applicability of doctrine of forfeiture by wrongdoing).

be drawn between forfeiture and the crime-fraud exception to the attorney-client privilege, which also exceeds the bounds of a single trial.

I. THE TRANSFERRED INTENT DOCTRINE OF FORFEITURE BY WRONGDOING

The Supreme Court in *Giles v. California* resolved the issue of whether the doctrine of forfeiture by wrongdoing requires the proponent of a potential witness's hearsay statement to prove that the adverse party procured the witness's unavailability with the intent of rendering the witness unavailable at trial.[15] In *Giles*, Dwayne Giles claimed that he killed his ex-girlfriend in self-defense, prompting the prosecution to call a police officer to testify concerning statements the ex-girlfriend made to him about acts of domestic violence Giles committed against her three weeks before her death.[16] The *Giles* dissent found that these statements were admissible under the doctrine of forfeiture by wrongdoing because Giles (1) caused his ex-girlfriend to be unavailable to testify and (2) benefitted from her unavailability.[17]

In his plurality opinion, Justice Scalia determined that, after finding causation, the focus should not be on whether the adverse party benefitted from the witness's unavailability; instead, the focus should be on whether the conduct that caused the witness to be unavailable was "intended to prevent [the] witness from testifying."[18] According to Scalia, while the State and dissent justify forfeiture "by invoking the maxim that a defendant should not be permitted to benefit from his own wrong, . . . the 'wrong' . . . to which these statements referred was conduct designed to prevent a witness from testifying."[19]

As per his modus operandi, Justice Scalia found that the doctrine depends on intent by scouring the common law and determining that "[t]he common-law forfeiture rule was aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them—in other words, it is grounded in 'the ability of courts to protect the integrity of their proceedings.'"[20] In reaching this conclusion, Justice Scalia did not need to dig too deep. In its landmark Confrontation Clause opinion in *Crawford v. Washington* in 2004, the Supreme Court implied that the doctrine of forfeiture by wrongdoing is designed to secure the integrity of the trial system[21] and made this finding explicit two years later in *Davis v. Washington*.[22]

By focusing on the intent of the defendant and finding that forfeiture by wrongdoing is aimed at deterring defendants from intimidating,

15. *Giles*, 554 U.S. at 358.
16. Id. at 356.
17. Id. at 384 (Breyer, J., dissenting).
18. Id. at 361 (plurality opinion).
19. Id. at 365.
20. Id. at 374 (citing Davis v. Washington, 547 U.S. 813, 834 (2006)).
21. 541 U.S. 36, 62 (2004).
22. 547 U.S. at 833 (citing *Crawford*, 541 U.S. at 62).

bribing, and killing witnesses, the Court allowed for transferred intent principles to apply in the forfeiture context. The doctrine of transferred intent can be explained by an example: If Defendant intends to kill Albert but ends up killing Bob, he satisfies the mens rea to be convicted of murdering Bob because his intent to kill Albert transfers to his killing of Bob. And, while courts are split on the issue, many hold that in this hypothetical, Defendant's intent to kill Albert transfers to his killing of Bob even if Defendant is successful in killing Albert, allowing Defendant to be convicted of both murders. These courts hold that the goal of transferred intent—deterring "those contemplating injury to another"—is best served by allowing the prosecution to use Defendant's intent to kill to prove his mens rea at both murder trials.[23]

The same reasoning applies to the doctrine of forfeiture by wrongdoing. That doctrine is intended to deter defendants from intimidating, bribing, and killing prospective witnesses both to protect those witnesses and the integrity of the trial system.[24] As in the transferred intent context, courts can best achieve this deterrence by applying the doctrine of forfeiture by wrongdoing both at the trial at which the prospective witness was expected to testify *and* at the defendant's subsequent trial for murdering the witness. Therefore, once triggered, the doctrine should apply in "all proceedings," with the defendant's intent to render the witness unavailable transferring to these successive prosecutions.[25]

II. THE COCONSPIRATOR ADMISSION RULE & FORFEITURE BY WRONGDOING: AN "UNUSUAL" PAIR

Notwithstanding the above analysis, many read *Giles* as concluding that forfeiture by wrongdoing only applies in the witness-tampering context and would not apply to the subsequent prosecution of a defendant for murdering or incapacitating a prospective witness.[26] Such conclusions are unsurprising given Justice Scalia's aforementioned statement during oral argument that the doctrine does not apply to "other litigation," but they are also misguided.[27]

Initially, setting aside Scalia's opinion for a second, the concurring opinion by Justices Souter and Ginsburg clearly adopts the transferred intent doctrine. The concurrence specifically mentions the possibility of forfeiture applying when "a defendant is prosecuted for the very act that

23. State v. Worlock, 569 A.2d 1314, 1325 (N.J. 1990).

24. See supra note 20 and accompanying text (discussing plurality opinion's construction of doctrine of forfeiture by wrongdoing in *Giles*).

25. Vazquez v. People, 173 P.3d 1099, 1107 (Colo. 2007).

26. See, e.g, Garces v. Yates, No. 09-CV-01767-H (CAB), 2011 WL 2313607, at *10 (S.D. Cal., June 9, 2011) ("[T]he United States Supreme Court held that the forfeiture exception does not apply outside of the witness tampering context.").

27. See supra note 14 and accompanying text (discussing Justice Scalia's statements during *Giles* oral argument).

causes the witness's absence, homicide being the extreme example."[28] Accordingly, the concurrence recognizes that forfeiture can apply when, for instance, a defendant kills a prospective witness at his trial for some crime such as robbery and is then prosecuted for the witness's murder.

Surprisingly, Justice Scalia's opinion also concludes that forfeiture can apply when a defendant is prosecuted for the same act that caused the witness's absence, albeit in a footnote. In that footnote, Scalia begins by criticizing the dissent for allowing forfeiture without a showing of intent because it allows for a trial-within-a-trial in which the judge finds that the defendant committed the murder charged before the jury renders its verdict.[29] Scalia is uncomfortable with this construction and notes that the only analogous rule that allows a judge to predetermine guilt is the coconspirator admission rule.[30] Under this rule, a judge, often at a conspiracy trial, decides whether a declarant made statements during the course and in furtherance of a conspiracy with the defendant.[31]

Scalia writes this rule off as "quite unusual" but then acknowledges that such a judicial predetermination of guilt can occur under the Court's construction of forfeiture:

> We do not say, of course, that a judge can never be allowed to inquire into guilt of the charged offense in order to make a preliminary evidentiary ruling. That must sometimes be done under the forfeiture rule that we adopt—when, for example, the defendant is on trial for murdering a witness in order to prevent his testimony.[32]

In other words, notwithstanding his statements during oral argument, Justice Scalia adopts the transferred intent doctrine of forfeiture by wrongdoing. Moreover, this adoption makes sense given Scalia's recognition that both the coconspirator admission rule and, by implication, the doctrine of forfeiture by wrongdoing, are "quite unusual" in allowing judicial predeterminations of guilt.

As noted, the coconspirator admission rule usually applies at conspiracy trials, but that is not always the case. Instead, a prosecutor can rely upon the rule even when he does not charge conspiracy, and he can also use the rule to prosecute crimes unrelated to the conspiracy.[33] This is because the coconspirator admission rule is based upon agency theory, with a defendant being responsible for his coconspirator's statements during the course and in furtherance of the conspiracy at *any* trial based upon their relationship.[34]

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28. Giles v. California, 554 U.S. 353, 379 (Souter, J., concurring in part).

29. Id. at 374 n.6.

30. Id. (citing Fed. R. Evid. 801(d)(2)(E)).

31. Fed. R. Evid. 801(d)(2)(E).

32. *Giles*, 554 U.S. at 374 n.6 (emphasis added).

33. See, e.g., United States v. Moon, 512 F.3d 359, 363 (7th Cir. 2008) (explaining "[s]ome prosecutors may believe that they need to charge conspiracy in order to take advantage of the co-conspirator exception to the hearsay rule . . . but that's a mistake").

34. See id. ("This rule of evidence depends on principles of agency, so it applies . . .

The forfeiture by wrongdoing doctrine is also based upon a relationship: the relationship between the defendant and the incapacitated witness. Just as a defendant cannot claim that the admission of a coconspirator's statement against him violates the Confrontation Clause because of their conspiratorial relationship, a defendant cannot raise a Confrontation Clause claim against statements made by a prospective witness when his purpose-driven wrongdoing caused the witness's unavailability.

Federal Rule of Evidence 804 reveals the extent to which a defendant's fate is tied to the fate of the prospective witness he seeks to deter from testifying. According to that Rule, the doppelgänger to the doctrine of forfeiture by wrongdoing, a declarant is not deemed "unavailable" for purposes of Rule 804 hearsay exceptions when his unavailability was procured by the purpose-driven wrongdoing of the proponent.[35] In other words, a declarant can be both "unavailable" for the prosecution, allowing his statements to come in under the doctrine of forfeiture by wrongdoing, and "available" for the defendant, meaning that he cannot admit the declarant's exculpatory statements under a Rule 804 exception.

In a sense, then, as some courts have recognized, similar logic supports forfeiture by wrongdoing and adverse inference instructions.[36] If a party destroys evidence intentionally or in bad faith, the court can give an adverse inference instruction that the destroyed evidence would have been favorable to the other party.[37] A similar instruction can also be given when a party fails to produce an available witness who "could reasonably be expected, by his relationship to the party or the issues, to have peculiar or superior information material to the case that, if favorable, the party would produce."[38] Finally, adverse inference theory prevents the wrongdoing party from presenting any favorable information connected to the destroyed evidence or nonappearing witness.[39]

As with the doctrine of forfeiture by wrongdoing, adverse inference instructions are directed toward deterring witness/evidence tampering and securing the integrity of the trial process.[40] And, as with

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whether or not the indictment has a conspiracy count.").

35. Fed. R. Evid. 804(a).

36. See, e.g., Steele v. Taylor, 684 F.2d 1193, 1202 (6th Cir. 1982) ("[O]nce evidence is produced that demonstrates good reason to believe the defendant has interfered with the witness, adverse inferences may be drawn from the failure of the defense to offer credible evidence to the contrary.").

37. See, e.g., Apple Inc. v. Samsung Elecs. Co., No. 11-CV-01846-LHK, 2012 WL 3627731, at *4 (N.D. Cal., Aug. 21, 2012) (giving adverse inference instruction based upon Samsung's failure to prevent destruction of relevant evidence).

38. State v. Lewis, 717 A.2d 1140, 1159 (Conn. 1998) (citations omitted).

39. See, e.g., SEC v. Caramadre, 717 F. Supp. 2d 217, 224 (D.R.I. 2010) ("This Court, or whichever court ends up presiding over any trial of the Commission's claims against Respondents, can preclude use of the interviews for the purpose of adverse inferences.").

40. See Int'l Union, United Auto., Aerospace and Agr. Implement Workers of Am. (UAW) v. N.L.R.B., 459 F.2d 1329, 1338 (D.C. Cir. 1972) (noting that "the adverse inference rule plays a vital role in protecting the integrity of the administrative process in cases where

coconspirator admissions, adverse inference instructions transcend the bounds of a single case because of the relationship between the party and the nonappearing witness or the destroyed evidence.[41] This same reasoning supports the recognition of the transferred intent of the doctrine of forfeiture, which is (a) based upon the relationship between the defendant and the incapacitated witness and (b) designed to prevent witness tampering.

III. THE CRIME-FRAUD EXCEPTION AND FRUSTRATED PURPOSES

Like adverse inference instructions and the doctrine of forfeiture by wrongdoing, the crime-fraud exception to the attorney-client privilege is also directed towards deterring wrongdoing and securing the integrity of the trial process.[42] Under the crime-fraud exception, the attorney-client privilege is vitiated when a client uses an attorney's services to attempt to perpetrate a crime or fraud, including witness tampering and the destruction of evidence.[43] Moreover, this exception is based upon the client's wrongful intent, regardless of whether the client ultimately benefits from the attorney's advice.[44]

"[T]he rule accepted by all courts today is that a client's communication to his attorney in pursuit of a criminal or fraudulent act yet to be performed is not privileged in any judicial proceeding."[45] Courts categorically apply this rule based upon the recognition that the exception's goal of securing the integrity of the trial system (and the attorney-client relationship) would be frustrated if a party forfeited the attorney-client privilege at one trial but could then assert it at another.[46]

Similarly, it would be counterproductive to find that a defendant's purpose-driven conduct leads to waiver of his Confrontation Clause objection to the admission of hearsay statements at one trial but not at another. If forfeiture by wrongdoing were simply a witness-tampering

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a subpoena is ignored").

41. See, e.g., Am. Hospitality Mgmt. Co. of Minn. v. Hettinger, 904 So. 2d 547, 551 (Fla. Dist. Ct. App. 2005) (finding that it may be proper for court to give adverse inference instruction "at any trial on remand," including trials involving different causes of action).

42. See, e.g., Rambus v. Infineon Techs. AG, 220 F.R.D. 264, 282 (E.D. Va. 2004) (applying crime-fraud exception based upon inconceivability that Court of Appeals would find "corporate client's interest in confidential communications respecting destruction of documents in anticipation of litigation" outweighs "societal need to assure the integrity of the process by which litigation is conducted").

43. See, e.g., Intervenor v. United States, 144 F.3d 653, 660 (10th Cir. 1998) ("The evidence must show that the client was engaged in or was planning the criminal or fraudulent conduct when it sought the assistance of counsel and that the assistance was obtained in furtherance of the conduct or was closely related to it.").

44. See, e.g., United States v. Doe, 429 F.3d 450, 454 (3rd Cir. 2005) (finding that crime-fraud exception applies based upon defendant's intent and applying exception even when intended crime is not committed).

45. Sawyer v. Barczak, 229 F.2d 805, 808–09 (7th Cir. 1956).

46. See, e.g., In re Berkley and Co., Inc., 629 F.2d 548, 554–55 (8th Cir. 1980) ("When the attorney-client relationship has been thus abused we perceive no justification for sustaining the privilege in any context.").

rule, such a result could occur. But, under the purpose-driven doctrine recognized by the Court in *Giles*, the doctrine of transferred intent applies to the doctrine of forfeiture by wrongdoing, meaning that, contrary to Justice Scalia's statement during oral argument, forfeiture applies to "other litigation."

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