

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

PETER D. O'CONNELL, PRESIDING JUDGE

HENRY WILLIAM SAAD AND MICHAEL TALBOT, JUDGES

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

Docket No. 134206

GERACER RAPHAEL TAYLOR,

Defendant-Appellant.

_____/

BRIEF AMICUS CURIAE IN SUPPORT OF DEFENDANT

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SUMMARY OF ARGUMENT

There is no need to reach constitutional issues in this case. Lasater's statements should be held inadmissible on the ground that they were manifestly made without personal knowledge.

If the Court is nevertheless tempted to reach issues related to the Confrontation Clause, it should wait until the United States Supreme Court decides the pending case of *Giles v. California*, No. 07-6053, reviewing *People v. Giles*, 40 Cal.4th 833, 152 P.3d 433 (2007), which is likely to resolve, or at least cast light on some of the issues posed by the Court.

If the Court does not wait for the decision in *Giles*, it should conclude that Lasater's statements were testimonial. There is no dying-declaration exception to the Confrontation Clause as such, but the defendant may have forfeited his right to confront Lasater by killing him. Even if so, however, the forfeiture extends only to the extent of the problem created by the defendant's wrongful conduct. There is no basis for concluding that, if Lasater were able to testify as a live witness, his testimony would support a finding that he made a personal observation of the shooter. Accordingly, his statements should be excluded.

ARGUMENT

I. Lasater's Statement Should be Held Inadmissible Without Need to Reach Any Constitutional Issues.

There is no need for the Court to reach any constitutional issue in this case. Even assuming that all other conditions for admissibility of Lasater's statement are met, the statement should be excluded because the State has not provided evidence sufficient to support a finding that Lasater spoke from personal knowledge. The Court of Appeals, examining the evidence in the light most favorable to the State, concluded that the evidence supported the conclusion that the defendant shot Lasater (1) at night, (2) from outside Lasater's window, (3) while Lasater was in bed. In this setting, there is no basis on

which a reasonable jury could conclude that Lasater spoke on the basis of personal observation. This is particularly so given that, as indicated by the Court of Appeals, “defendant and Lasater fought the night before the shooting,” thus supporting the conclusion “that defendant had a preconceived motive to shoot Lasater.” 275 Mich.App. At 180, 737 N.W.2d at 793. Lasater, of course, was aware of this information. The only plausible inference in the circumstances, then, is that when Lasater identified defendant as the shooter, he was drawing an inference based on a past incident, rather than reporting his personal observation of the shooting itself.

The fact that Lasater was not speaking from personal knowledge renders his statement inadmissible for three reasons, apart from constitutional factors.

First, a hearsay declaration that otherwise fits within an exemption to the rule against hearsay should not be admitted unless the proponent presents sufficient evidence to support the conclusion that the declarant was speaking from personal knowledge. The personal knowledge requirement is, of course, a predicate for the testimony of a live witness. MRE 602 (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”) It would make no sense to waive the requirement when an inferior, and substitute, form of evidence – the testimony of a hearsay declarant, not present at trial, not under oath, and not subject to cross-examination – is presented. *See, e.g., People v. Welch*, 226 Mich.App. 461, 574 N.W.2d 682 (1997) (holding that because there was “a significant question . . . concerning whether” declarant who had made statement to police officer did so on personal knowledge, statement was inadmissible, and approvingly quoting *United States v. Trenkler*, 61 F.3d 45, 58 (1st Cir. 1995), to the effect that the personal knowledge requirement is “common to the . . . hearsay exceptions”); *People v. Kent*, 157 Mich.App 780, 788, 404 NW2d 668 (1987) (personal knowledge of declarant held to be a prerequisite for application of excited

utterance exception, with burden on proponent); JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1751 (Chadbourn rev. 1976) (“Upon the ordinary principle applicable to all testimonial evidence . . . , and therefore to hearsay statements offered under these exceptions [for spontaneous exclamations . . . , the declarant must appear to have had *an opportunity to observe personally* the matter of which he speaks.”). There may be some basis for applying the rule leniently where it appears probable that, had the declarant been subjected to examination, as a live witness is, his personal knowledge of the material substance of the statement could have been established. But there is no basis in this case for concluding that this condition has been met. Given the circumstances, had Lasater survived the attack, he would not have been allowed to testify at trial that the defendant was the assailant. His out-of-court statement can stand on no better footing.

Second, the factual basis supporting Lasater’s inference that defendant was the person who shot him could be presented to the jury as admissible evidence – and in fact it was presented, very amply, to the jury. The jury, the trier of fact, was thus in a position to determine whether the inference was valid. Lasater’s statement expressing that inference therefore could not be “helpful to . . . the determination of a fact in issue,” and it should have been excluded under MRE 701.

Finally, the same reasoning shows that Lasater’s statement expressing his inference had no substantial incremental probative value. It therefore should have been excluded under MRE 402 as not being relevant under MRE 401, or in the alternative, it should have been excluded under MRE 403, because its minimal probative value was clearly outweighed by the factors listed in that Rule.

II. The Court Should Not Decide Any Constitutional Issues At This Time, Because a Case Now Pending Before the United States Supreme Court Will Likely Resolve, or at Least Shed Considerable Light, on Issues Posed by this Court.

If, contrary to the argument presented above, the Court believes that it must address issues under the Confrontation Clause to decide this case, the prudent course would be to wait for the Supreme Court to decide the pending case of *Giles v. California*, No. 07-6053, reviewing *People v. Giles*, 40 Cal.4th 833, 152 P.3d 433 (2007), which will be argued on April 22. The decision in *Giles* will likely resolve, or at least shed light on, two of the specific questions posed by the Court in its order of November 27, 2007. The only one of those questions on which *Giles* does not touch is the first, but that is not likely to be dispositive of the case.

In *Giles*, the accused was tried for the murder of his former girlfriend, Brenda Avie. It is undisputed that Giles killed Avie; the only issue as to guilt on the merits was whether he did so in self-defense. The prosecution offered a statement made several weeks before the killing by Avie to a police officer, accusing Giles of having attempted to strangle her. Giles' objection on Confrontation Clause grounds to admission of this evidence was rejected by the California Supreme Court. In light of the powerful evidence supporting the proposition that Giles in fact killed Avie without justification, and therefore by his wrongful conduct rendered Avie unable to be a witness at trial, that court held that Giles forfeited the confrontation right. Giles petitioned the United States Supreme Court for *certiorari*, contending that he should not be deemed to have forfeited the confrontation right absent proof that he killed Avie *for the purpose* of rendering her unavailable as a trial witness. The Court has granted the writ. The briefs filed thus far in the case may be found at the Confrontation Blog, maintained by *amicus*, www.confrontationright.blogspot.com.

Although the substantive views of *amicus* are largely supportive of the state in *Giles*, *amicus* filed a brief, as *amicus*, in support of the petition for *certiorari*, because he believes the case is a good one to resolve the question presented by the petition. One reason bears on declarations such as those involved in the case now before this Court.

Amicus takes it as a given that statements fitting within the traditional hearsay exception for dying declarations should, at least for the most part, be admitted notwithstanding the Confrontation Clause. See *Mattox v. United States*, 156 U.S. 237, 243-44 (1895) (“from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility”). The question, though, is why. The rationale most often given – that “the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of oath,” *id.* at 244 – fails on several grounds. (1) Whatever the force of the rationale in earlier times, one can hardly say that today the prospect of imminent death will universally induce speakers to tell the truth so that they will avoid eternal damnation.

(2) If the rationale were correct, it would support an exception for any statement made by the speaker while believing that death was imminent. But in fact the exception as traditionally expressed is far more limited. See, e.g., MRE 804(b)(2) (excepting from the hearsay rule, “[i]n a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death”).

(3) At most, the rationale would suggest that dying declarations are unlikely to be the result of deliberate mendacity on the part of the speaker. It would provide no reason to believe that the statement

is free from the defects of failed perception (a critical problem in this case, of course), or failed memory, or ambiguity.

(4) Even if the rationale were persuasive on its own terms, it would at most support a conclusion that dying declarations are reliable. But to base a rule on that conclusion does not cohere at all with the basic theory of *Crawford v. Washington*, 541 U.S. 36, 61 (2004), that the Confrontation Clause “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”

If, however, as appears probable, the Supreme Court holds in *Giles* that a purpose to render the witness unavailable is not necessary for forfeiture,¹ then a far more satisfactory explanation for the dying declaration cases becomes apparent: If the court determines as a threshold matter that the accused killed the victim without justification, then the accused’s wrongful conduct has accounted for the victim’s unavailability. The dying declaration cases therefore become a rather straightforward application of forfeiture theory. See *Reynolds v. United States*, 98 U.S. 145, 158 (1878) (holding that “if a witness is absent by [the accused’s] own wrongful procurement, he cannot complain if competent evidence is

¹ See Linda Greenhouse, *Justices to Hear Case Testing Rule on Witness*, N.Y. Times, Jan. 12, 2008, available at http://www.nytimes.com/2008/01/12/us/12scotus.html?_r=1&th&emc=th&oref=slogin. Greenhouse, a Pulitzer Prize winner, is the long-time Supreme Court reporter for the New York Times, and one of the most sophisticated observers of that Court. In reporting on the grant of *certiorari* in *Giles*, she said:

It is . . . likely that the justices accepted the new case, *Giles v. California*, No. 07-6053, to make it clear that as long as the victim’s unavailability as a witness was a foreseeable consequence of the murder, the Sixth Amendment does not require the state to prove the actual motive for the murder was to make the victim unavailable.

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.”²

III. Under the Preferred Constitutional Analysis, Lasater’s Statement Should Be Held Inadmissible Because He Did Not Speak From Personal Knowledge.

If notwithstanding the above arguments, the Court reaches the constitutional issues in this case, *amicus* believes it should conclude as follows:

(1) Lasater’s statements were plainly testimonial. The Court of Appeals held that the statements were non-testimonial because the police arrived immediately after the incident, there were several other people in the house, and the victim, who was clearly dying, identified his assailant. 275 Mich.App. At 182, 737 N.W.2d at 794. This holding is utterly unpersuasive.

² A conclusion of forfeiture depends on the court’s determination as a preliminary matter, to the requisite degree of probability, that the accused rendered the witness unavailable. In a case such as this one, the crime charged is also the conduct that allegedly rendered the witness unavailable. That fact does not preclude application of forfeiture doctrine. Both the court and the jury must determine whether the accused engaged in given conduct. But the court must make that determination for one purpose (to decide whether the confrontation right has been forfeited), and the jury must make it for another (to determine guilt on the merits). The situation is thus exactly comparable to the one that arises when, in a case charging conspiracy, the admissibility of a statement depends on a determination that the accused and the declarant were members of the conspiracy. *E.g., Bourjaily v. United States*, 483 U.S. 171 (1987). And indeed, just as in that setting, the trial court, in considering whether the predicate for admission of the challenged statement is met, should not be barred from relying, at least in part, on the challenged statement itself. *Id.* at 181.

A conclusion of forfeiture should also depend, in the view of *amicus*, on a determination that the state has taken whatever reasonable steps it could have to preserve the confrontation right of the accused. Thus, if the accused cast a fatal blow, but the victim lingered long enough that it would be neither impractical nor inhumane to take a deposition, then the state should have offered one. This principle accords closely with the prevailing practice about the time of the framing of the Confrontation Clause. *E.g., R. v. Forbes*, Holt 599, 171 Eng.Rep. 354 (1814) (deposition of dying victim; only the portion held in presence of the accused held admissible); *R. v. Dingler*, 2 Leach 561, 168 Eng. Rep. 383 (1791) (statement by lingering victim held inadmissible; court indicatst hat a deposition could have been taken in the presence of the accused). It also accords closely with an aspect of dying declaration doctrine – that the statement have been made while the declarant believed that his “death was imminent.” When the declarant believes that death is imminent, that is a strong indication that it is *not* both practical and humane to hold a deposition.

There is no plausible basis on which to conclude that the primary purpose of the conversation between Officer Kriss and Lasater was to respond to the emergency of the shooting. Trying to ascertain the identity of the assailant served no medical purpose. Nor was this a situation in which the officer tried to ascertain the identity of the assailant so that he could prevent further immediate violence. There is no suggestion that he thought the shooter had remained in the immediate vicinity; he did not suspect that the shooter was among the other people in the house, who were *sleeping*. This conversation was exactly what it appeared on its face – an attempt by the officer to ascertain Lasater’s identification of the shooter for investigative purposes. Thus, Kriss himself referred to the conversation as an “interview,” and he told Lasater that he was unlikely to “make it.” That statement may have been the attempt of a sophisticated police officer to lay the groundwork for invocation of a dying declaration exception. In any event, it clearly revealed that his focus was on a future in which Lasater would likely no longer be able to participate.

The situation is even clearer with respect to Lasater’s statements to Officer Bonacorsi in the ambulance; there was no emergent situation to which the officer could reply.

(2) *Amicus* assumes the trial court would be well justified in concluding that defendant forfeited the confrontation right by killing Lasater without justification. Some courts have applied a “preponderance of the evidence” standard to the forfeiture issue. *E.g., Commonwealth v. Edwards*, 444 Mass. 526, 542, 830 N.E.2d 158, 172 (2005). Arguably, though, a more rigorous standard, like “clear and convincing evidence,” should apply. *See, e.g., United States v. Thevis*, 665 F.2d 616, 627-31 (5th Cir.1982), *cert. denied*, 459 U.S. 825 (1982); *People v. Geraci*, 85 N.Y.2d 359, 625 N.Y.S.2d 469, 649 N.E.2d 817 (1995). *Amicus* assumes that even this more demanding standard is met here.

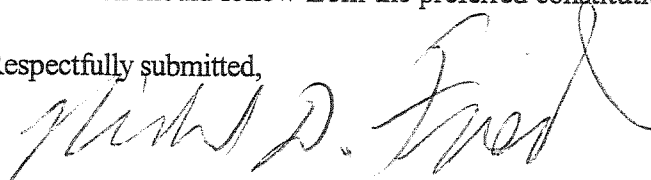
(3) Assuming that defendant forfeited the confrontation right, he cannot complain about the consequences of his wrongful conduct. But forfeiture doctrine cannot cause him to suffer adverse consequences that his wrongful conduct did not create. The (hypothesized) fact that defendant killed Lasater prevented Lasater from being able to testify subject to cross-examination; it did not prevent Lasater from observing who shot him. If Lasater had survived to testify at trial, he would have been no better able to speak from personal knowledge than he was immediately after the shooting. Whether as a matter of the confrontation right or of the general right to due process, defendant could not be convicted on the basis of live testimony made without personal knowledge, and the same principle applies to Lasater's testimonial statement made out of court.

One could imagine a case in which it is unclear whether or not the witness rendered unavailable to testify by wrongful conduct had personal knowledge of the events he described. In such a case, the court might conclude that, had the witness been able to testify at trial, he might plausibly have established his personal knowledge. If it seems probable that this would have been the result – there is no need in this case to determine what level of probability would be sufficient – then, in the view of *amicus*, the accused probably still ought to be deemed to have forfeited the confrontation right; having wrongfully rendered the witness unable to satisfy the personal knowledge requirement, if the witness unharmed would have been able to do so, there is at least a weighty argument that he, rather than the prosecution, ought to bear the burden of the uncertainty his wrongful conduct has created. But in this case there is no substantial probability that Lasater would be able to establish personal knowledge if he had testified at trial.

CONCLUSION

The essence here is Lasater's lack of personal knowledge. His statements were improperly admitted, and therefore the judgment below should be reversed. The Court can reach this conclusion without deciding constitutional issues, and it should not decide such issues before the Supreme Court's decision in *Giles*. But the same conclusion should follow from the preferred constitutional analysis.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard D. Friedman". The signature is written in a cursive style with a large, sweeping flourish at the end.

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