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Voices from the grave

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Last week, the U.S. Supreme Court heard oral arguments in *Giles v. California*, No. 07-6053.

At issue was whether the defendant's Sixth Amendment right to confront his accusers was violated where the trial court admitted the dead victim's prior statements into evidence, where the statements implicated the defendant in her murder.

Last year, the New York State Court of Appeals considered a similar issue in *People v. Nieves-Andino*, 2007 NY Slip Op 05584, but never reached the constitutional merits of the issue, concluding instead that the victim's statements were not testimonial.

In *Nieves*, Jose Millares, the victim who later died, was discovered lying in the road by a police officer responding to a 911 call regarding shots fired.

The responding officer summoned an ambulance and then asked Millares for his name and other pedigree information. He also asked him what had happened. Millares responded that he had argued with a man named Bori who had shot him three times.

The defendant argued that admitting the victim's statement into evidence at trial would violate his Sixth Amendment right to confront the witnesses against him pursuant to the Supreme Court's ruling in *Crawford v. Washington*. The prosecution argued that the statement fell under the excited utterance exception to the hearsay rule and that its admission would not violate the Sixth Amendment.

The court concluded the victim's statements did not violate the defendant's right to confront witnesses against him since the officer's primary purpose in questioning Millares was to address an ongoing emergency, and thus the statements were not testimonial in the first instance: "Our decision is guided by *Crawford v. Washington* (541 US 36 [2004]) and *Davis v. Washington* (126 S Ct 2266 [2006]). In those cases, the Supreme Court held the Federal Confrontation Clause prohibits the 'admission of testimonial statements of a witness who did not appear at trial unless [the wit-

ness] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination' (*Davis*, 126 S Ct at 2273). Only statements that are testimonial make the absent declarant a 'witness' within the meaning of the Confrontation Clause (see *id.*) ... When ... a police officer justifiably believes that the assailant no longer poses a threat to the victim, the purpose of his or her interrogation of the victim may 'evolve' from dealing with an ongoing emergency to establishing past events with a view to later criminal prosecution (*id.*). On this record, however, the initial purpose of Officer Doyle's inquiry did not change."

In contrast, under the facts of *Giles v. California*, the statement appears to be testimonial, therefore the Supreme Court must address the constitutional issue and consider whether the defendant's Sixth Amendment rights were violated by the trial court's decision to admit the dead victim's statements into evidence.

The highest appellate court below, the California Supreme Court, concluded the defendant waived the right to confront his accuser by operation of the common law "forfeiture by wrongdoing" doctrine, since his actions were the very reason that the dead victim was unavailable to testify.

Based on recent decisions from the Supreme Court, I predict that it will uphold the California Supreme Court's ruling.

This conclusion, while an uncomfortable one for me as a criminal defense attorney, is the only outcome that would make sense from a public policy perspective. To hold otherwise would be to encourage assailants to cause every physical assault to end in death in order to take advantage of the protective umbrella of the Sixth Amendment.

Quite frankly, I'm not sure that the alternative — allowing murderers to benefit from the death of their victim — is one that should be available in a civilized society such as our own.

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