Study K-600 October 26, 2007

Third Supplement to Memorandum 2007-41

Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing (Comments of Prof. Flanagan and Prof. Méndez)

Attached for the Commission's consideration are the following new comments relating to forfeiture by wrongdoing:

The staff regrets that we have not had time to provide any analysis of these comments. Prof. Méndez will, however, be available at tomorrow's meeting to explain his views as needed. We also plan to discuss his comments and Prof. James Flanagan's comments in future memoranda for the Commission.

The staff has also learned that an initiative measure on forfeiture by wrongdoing might be on the November 2008 ballot. We will look into this further when time permits.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

To: Ms. Barbara Gaal, Chief Deputy Counsel
California Law Reform Commission

From: Professor James Flanagan
University of South Carolina School of Law

Re: CLRC study of forfeiture by wrongdoing

Date: October 22, 2007

Thank you for the opportunity to comment on the Commission's study of forfeiture by wrongdoing. This is a topic of some interest to me and I have written on the subject. I also am assisting the counsel for the petitioner in *People v. Giles* in seeking review of the intent issue by the Supreme Court. I concur that it is premature to eliminate the intent requirement before the Supreme Court addresses the issue. The Staff Memorandum 2007-41 and the supplementary materials with the comments of Professors Mendez and Fisher cover the topic in detail, and I have only a few additional thoughts to contribute.

First, the courts that developed the hearsay exception for forfeiture by wrongdoing never maintained that the reliability of the victim's hearsay statements justified their admissibility. The courts generally relied on the arguments that a person should not benefit from a wrong, that such wrongdoing should be deterred, and that the hearsay statements was a substitute for the live testimony that was no longer available to the prosecution. The credibility of the absent witnesses in many cases can be challenged because of their often conflicting motives. Although, the Supreme Court no longer uses reliability in its constitutional analysis of the Sixth Amendment, legislators drafting an exception to the hearsay rule must be concerned about the reliability of the absent witness's statements, particularly when the circumstances in which they are made do not provide any indication they are reliable, and there is no cross-examination. Evidence Code § 1350 addresses the reliability of the hearsay statements through the requirements of § 1350(a)(2)-(4). The legislature should give serious consideration to maintaining those requirements in any revision of the statute to provide procedural protections against unreliable hearsay.

Second, Federal Rule of Evidence 804(b)(6) reaches beyond those who directly tamper with the witness to include those who "acquiesce" in the wrongdoing. In my view, "acquiesce" is a particularly inappropriate term because it includes not only those who agree and encourage the wrongdoing, but also those who merely accept the wrongdoing without agreeing to it. Applying the statute without individualized evidence of agreement, particularly to those who may not have prior knowledge or ability to affect the wrongdoing, is problematic at best. Tennessee, in adopting its forfeiture rule, followed the language of the federal rule but omitted "acquiesce" because of its inherent flexibility. This may be one of the reasons why there is a paucity of case law, noted by the staff memorandum as another reason for not using the term.

(Memo 2007-41 at 39). A more detailed explanation of my concerns about "acquiesce" and the lack of inherent reliability in the statements appears in an earlier work of mine on the topic.[1]

Finally, I strongly concur with Professor Fisher's comments about giving careful consideration to the consequences of a broad forfeiture by wrongdoing rule for certain categories of cases, as well as his comment about the ambiguity in the term "cause" as in "cause the unavailability of the witness." Section 1350 is a carefully drafted and limited expression of the forfeiture by wrongdoing rule. The drafters of any amendments should carefully choose any language that broadens the statute's application to avoid creating a rule that makes it easy to use in situations where the witness might well have testified.

I trust that you may find these comments useful, and please let me know if there is anything further that I can do to assist you in this project.

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[1] Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding its Grasp and Other Problems with Federal Rule of Evidence 804(b)(6),* 51 Drake L. Rev. 459, 498-526 (2003).

To Barbara Gaal
From: Miguel A. Méndez
Re: Response to Paul Bergman's Comments
Date: 10/24/07

First, Prof. Mendez discusses Sec. 1350 in detail on pp. 12-13, in particular its foundational requirement that a statement have been memorialized by a law enforcement official. Yet, he nowhere mentions that this foundational requirement almost certainly renders a statement inadmissible under the Confrontation Clause. Thus, I believe that his using Sec. 1350 as a basis of evaluating the propriety of proposed section 1390 is suspect.

The issue is not whether evidence offered under Section 1350 would violate the Confrontation Clause but whether a California forfeiture hearsay exception should incorporate some or all of the protections the Legislature included in Section 1350 when the evidence is offered after the judge has overruled the defendant's confrontation objection on Sixth Amendment forfeiture grounds. The Giles case is an example. The hearsay offered against the defendant under Section 1370 violated the Confrontation Clause, but the prosecution was nonetheless entitled to offer it because the court found that the defendant had forfeited his Sixth Amendment right to object to the evidence.

Second, as I read his analysis, Prof. Mendez suggests that under Rule 804 (b)(6), the federal forfeiture statute, a party offering hearsay under that provision still has to meet the foundational requirements of an independent hearsay exception. I believe that this position may also be mistaken. As I read Rule 804(b)(6), a party who meets its foundational requirements both (a) establishes a declarant's unavailability and (b) meets the foundational requirements of a hearsay exception. In other words, the conduct that constitutes forfeiture also establishes the trustworthiness of a declarant's hearsay statements. (Note that the federal forfeiture provision is in the second portion of Rule804, among a small group of exceptions to the hearsay rule, each based on an assumed basis of trustworthiness).

I could not find the text that Paul is referring to. What he may have in mind is the following: (1) proving the foundation of Rule 804(b)(6)'s forfeiture hearsay exception can also satisfy the unavailability requirement of Rule 804(a) because (2) the grounds of unavailability listed under Rule 804(a) are not exclusive. Under the Code, however, Subsection 240(a)'s *grounds of unavailability are exclusive (" 'unavailable as a witness' means that the declarant is any of the following"). As a general rule, then, a party relying on a California hearsay exception requiring the unavailability of the declarant must comply both with the requirements of the exception and the unavailability requirements of Subsection 240(a), unless in creating the exception (1) the Legislature created a new ground of unavailability that applies to that exception or (2) the unavailability ground specified in the exception coincides with one of the grounds in Subsection 240(a).*

Some existing hearsay exceptions require a showing of unavailability without defining the term (e.g., declarations against interest, former testimony) and in these instances the proponent must comply with Subsection 240(a). Others specifically refer to Subsection 240(a) (e.g., Section 1370). Some provide a new definition of unavailability that applies only to the exception created (e.g., Section 1350). Proposed Subsection 1390(a) does not define "wrongdoing that has caused the unavailability

of the declarant as a witness", so presumably the definition of the term is left to Subsection 240(a).

Finally, Prof. Mendez states on p. 2, footnote 8, that for a dying declaration to be admissible in California, "the declarant does not have to die." This statement also seems to me to be erroneous. CEC Sec. 1242 creates a hearsay exception for statements that, among other requirements, "respect the cause and circumstances of (the declarant's) death." Unlike its federal counterpart, Sec. 1242 seems to clearly require that the declarant die for a dying declaration to be admissible.

Under the Code, exceptions requiring the unavailability of the hearsay declarant expressly state this requirement. The exception of dying declarations does not require the proponent to establish the declarant's unavailability. Perhaps in almost all instances where a dying declaration is offered, the declarant in fact died. But if the declarant, for example, unexpectedly survives as a result of timely medical intervention and is available to testify, nothing in the exception precludes the proponent from offering the dying declaration to prove, for example, the identity of the person committing the assault in an attempted murder prosecution, so long as the judge finds that the declarant made the statement upon personal knowledge and under a sense of immediately impending death.

To: Barbara Gaal
From: Miguel A. Méndez
Re: Professor Daniel Capra's Comments

2. I think including a reliability requirement in a statutory forfeiture rule is self-defeating. If the hearsay statement is reliable, then it is almost certain to be admissible anyway under one of the hearsay exceptions --- meaning that the rule has virtually no practical effect. Moreover, if it is understood that even unreliable evidence is admitted when a defendant disposes of a witness, then two salutary consequences are possible: 1) the rule provides more deterrent effect; and 2) drafters would need to focus more closely on the consequences of the rule, perhaps meaning that other protections like an intent requirement or a higher standard of proof become more palatable.

It is unclear to me whether Professor Capra is objecting to the power given to California judges to exclude otherwise admissible evidence under Section 1350 on the ground that the circumstances surrounding the making of the hearsay declaration do not indicate trustworthiness or whether he is objecting to addition of such a provision to proposed Section 1390.

As I point out in my analysis, neither Section 1350 (the current forfeiture provision) nor proposed Section 1390 limit the hearsay that is admissible to the kind of hearsay that is believed to possess "circumstantial guarantees" of trustworthiness. So long as the forfeiture provisions of each of the sections is satisfied, the hearsay is admissible even if it is bereft of the circumstantial guarantees of trustworthiness built into such exceptions as declarations against interest, excited utterances, and the like. This is a good reason to give the judge the power to exclude the declaration offered in the case being tried whenever the judge concludes that the circumstances surrounding its making fail to inspire belief in its trustworthiness, notwithstanding the fact that the formal foundational elements have been met.

In Giles, the prosecution was unable to rely on any of the hearsay exceptions considered as possessing circumstantial guarantees of trustworthiness. The prosecution had to rely on Section 1370. Because hearsay offered under this exception may or may not possess these "guarantees," the Legislature expressly empowered the judge to exclude the declaration (even if it meets the formal foundational requirements) if the judge concludes that the proffered declaration was not made under circumstances indicating its trustworthiness. For the same reason, proposed Section 1390 should contain a similar provision.

Such a provision would not be inconsistent with other provisions requiring a higher standard of persuasion or an intent requirement. As I point out in my analysis, an intent requirement similar to that of Federal Rule of Evidence 804(b)(6) would be necessary in order to preserve Evidence Code Section 240's protection against finding declarants unavailable merely because they fear the defendant. Enacting a broad contumacious witness ground similar to that of the Federal Rules of Evidence without including an intent requirement under the state forfeiture hearsay exception could have that effect.

The Relationship Between Proposed Section 1390 and Section 240

Section 240 is designed to substitute "a uniform standard for the varying standards of unavailability" that applied to hearsay exceptions in California prior to the adoption of the Evidence Code. Section 240, Comment. Accordingly, where the proponent relies on a hearsay exception requiring proof of the hearsay declarant's unavailability, the proponent must ordinarily show the declarant's unavailability under Section 240. Examples include the hearsay exceptions for declarations against interest (Section 1230) and former testimony (Sections 1291-1292). Neither exception expressly refers to Section 240, but compliance under Section 240 is required.

New hearsay exceptions enacted after the adoption of the Evidence Code sometimes specifically refer to Subsection 240(a) (e.g., Section 1370). Some provide a new definition of unavailability that applies only to the exception created (e.g., Section 1350). With regard to unavailability, proposed Subsection 1390(a) provides that the hearsay declaration must be offered against "a party who has engaged or acquiesced in wrongdoing that has caused the unavailability of the declarant as a witness." It is unclear whether "unavailability" is to be defined under Subsection 240(a), or whether Subsection 1390(a) creates a new ground of unavailability. The question is important because the Commission should consider whether the creation of a new forfeiture hearsay exception might undermine current protections of the right to cross examine adverse witnesses who refuse to testify out of fear of the accused (or his allies).

Under current law, a judge may not declare as unavailable a witness who refuses to testify out of fear of the accused under Subsection 240(a)(3) ("existing physical or mental illness or infirmity"), unless the judge finds that expert testimony establishes that the physical or mental trauma suffered by the declarant during the commission of the crime charged has caused such harm that the declarant cannot testify or can do so only by suffering additional substantial trauma. See People v. Williams, 93 Cal. App.3d 40, 55, 155 Cal. Rptr. 414, 421 (1979). This limitation is now incorporated into Subsection 240 (c). It authorizes a judge find a witness to be unavailable under Subsection(a)(3) if "[e]xpert testimony establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma * * *."

If the unavailability provision of proposed Section 1390 is subject to Section 240, then a witness's refusal to testify out of fear of the defendant will be an insufficient ground for a judge to find the witness to be unavailable to testify, unless the requirements of Subsection (c) are met. But if Section 1390 is construed as creating a new ground of unavailability, then a witness's refusal to testify on account of the fear generated by his or her belief that the defendant is guilty of the crime charged could result in finding the witness's to be unavailable even if the requirements of Subsection (c) are not met. In the words of proposed Subsection 1390(a), the defendant's wrongdoing still "caused the unavailability of the declarant as a witness."

If Section 1390 does not create a new ground of unavailability but the Legislature adopts the Federal Rules' broad approach to the witness who refuses to testify, Section 240(c)'s protection could still be undermined. The adoption of the federal approach could be viewed as replacing the more limited approach to contumacious witnesses currently provided by the Subsections 240(a)(3)

(unable to testify because of then existing physical or mental illness or infirmity") and (c) (the expert witness limitation). Moreover, even if the broad approach is not viewed as a replacement, it would still provide an alternative ground for finding a witness who refuses to testify to be unavailable without having to comply with the requirements of Subsection (c). Subsection (c) specifically refers to Subsection 240(3).

One solution is to include language in the federal approach that compliance with the new subsection is not intended to excuse compliance with the Subsection (c) when the witness refuses to testify out of fear of the defendant. Another is to retain the intent requirement of proposed Subsection 240(6) ("the statement is offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did procure the unavailability of the declarant as a witness"). A third solution is to move the intent requirement of proposed Subsection (6) to proposed Subsection 1390(a), where it would replace that subsection's causation requirement. This would have the added benefit of eliminating the strict liability causation approach of Subsection 1390(a).