

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing

February 2008

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
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NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

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STATE OF CALIFORNIA

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February 14, 2008

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

At the request of the Senate Committee on Judiciary, the Law Revision Commission has been studying forfeiture by wrongdoing as an exception to the hearsay rule. The Commission submits this report in compliance with the March 1, 2008, deadline for this study.

Fundamental to our justice system is the principle that each side in a civil or criminal case is given the opportunity to question adverse witnesses under oath in the presence of the trier of fact. The federal and state constitutions guarantee this right of confrontation to a defendant in a criminal case; the federal and state prohibitions against use of hearsay evidence serve a similar function but apply to all parties in either a civil or a criminal case. The process of questioning witnesses in this manner promotes determination of the truth, so that justice can be served.

Sometimes, however, a person attempts to thwart justice by killing a witness, threatening a witness so that the witness refuses to testify, or engaging in other conduct that prevents a witness from testifying. If such conduct is sufficiently

egregious and appropriately proved, it may result in forfeiture of the constitutional right of confrontation, such that there is no constitutional barrier to admission of an out-of-court statement by the unavailable witness.

Similarly, federal law contains an exception to the hearsay rule, which applies when a party has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of a witness. If an out-of-court statement satisfies both the requirements of that exception and the constitutional requirements for forfeiture, the statement may be admitted in evidence. California has a similar hearsay rule exception, but it is narrower and more detailed than the federal one.

In 2007, the California Supreme Court gave guidance on the federal constitutional requirements for forfeiture. According to that court, those constitutional requirements are less stringent than the statutory requirements for admission of hearsay under the federal exception for forfeiture by wrongdoing, and far less stringent than the requirements for admission of hearsay under the California exception for forfeiture by wrongdoing. The Law Revision Commission was asked to consider whether California law should be revised to conform to the constitutional minimum as articulated by the California Supreme Court.

The ultimate authority on the federal constitutional requirements is not the California Supreme Court but the United States Supreme Court. The United States Supreme Court has not yet given guidance on key issues relating to forfeiture of the constitutional right of confrontation. Early this year, however, it agreed to review the California Supreme Court's decision on that topic. The United States Supreme Court is expected to issue its decision in the case by the end of June.

The Law Revision Commission recommends that the Legislature take no action on forfeiture by wrongdoing until after the United States Supreme Court issues the forthcoming decision. At that time, the Legislature will be in a better position than at present to assess the merits of the possible approaches.

In its study, the Commission considered the following possibilities:

- Repeal California's existing provision on forfeiture by wrongdoing and replace it with a provision that tracks the constitutional minimum as articulated by the California Supreme Court.
- Replace the existing provision with one similar to the federal rule.
- Broaden the existing provision to some extent.
- Leave the law alone.

To assist the Legislature when it assesses how to proceed, this report describes each of these approaches and relevant points to consider. After the United States Supreme Court acts, the Commission could provide further analysis if needed.

Whatever the Legislature decides on forfeiture by wrongdoing as an exception to the hearsay rule, its decision will have major implications for the criminal justice system and the public. It should make that decision carefully, with thorough deliberations and ample opportunity for persons to share their views.

In addition to studying forfeiture by wrongdoing, the Commission was asked to study whether a witness who refuses to testify should be considered "unavailable" for purposes of the hearsay rule. The Commission recommends that California's provision on unavailability be amended to expressly recognize that a witness is unavailable if the witness refuses to testify on a subject, despite a court order to

do so. This reform is in order regardless of how the United States Supreme Court rules on forfeiture of the federal constitutional right of confrontation.

This recommendation was prepared pursuant to Resolution Chapter 100 of the Statutes of 2007.

Respectfully submitted,

Sidney Greathouse
Chairperson

ACKNOWLEDGMENTS

Comments from knowledgeable persons are invaluable in the Commission's study process. In this study, the Commission is especially grateful for the assistance of Prof. Miguel Méndez (Stanford Law School), who has served as the Commission's consultant for its general review of the Evidence Code. The Commission would also like to express its appreciation to the other individuals and organizations who have taken the time to share their thoughts with the Commission.

Inclusion of the name of an individual or organization should not be taken as an indication of the individual's opinion or the organization's position on any aspect of this recommendation. The Commission regrets any errors or omissions that may have been made in compiling these acknowledgments.

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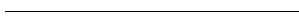
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MISCELLANEOUS HEARSAY EXCEPTIONS: FORFEITURE BY WRONGDOING

The Law Revision Commission was directed to study forfeiture by wrongdoing as an exception to the hearsay rule.¹ The Commission submits this report in compliance with the March 1, 2008, deadline for its report.²

On some occasions, misconduct by a defendant causes a declarant (a person who made a statement) to be unavailable to testify at trial. For example, a criminal defendant charged with a third strike might arrange for a key witness to be murdered. The goal of this study was to determine under which circumstances such misconduct should constitute an exception to the hearsay rule, such that an out-of-court statement by the unavailable witness can be introduced against the defendant. Any statute on this point will have to comply with the Confrontation Clause of the federal³ and state⁴ constitutions.

A related issue is whether the statutory definition of an “unavailable” witness for purposes of the hearsay rule should

1. See Letter from Ellen Corbett, Chair of Senate Committee on Judiciary, to Brian Hebert, Executive Secretary of California Law Revision Commission (Aug. 20, 2007) (Commission Staff Memorandum 2007-28 (Aug. 21, 2007), Exhibit p. 1).

Any California Law Revision Commission document referred to in this recommendation can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

2. See Letter from Ellen Corbett, *supra* note 1.

3. U.S. Const. amend. VI.

4. Cal. Const. art. I, § 15; see also Penal Code § 686.

expressly include a witness who refuses to testify. The Commission was also asked to study this issue.⁵

To provide context for consideration of these issues, it is necessary to present some background information on the hearsay rule and the Confrontation Clause.

Next, the Commission examines what constitutes unavailability for purposes of the hearsay rule. The Commission recommends that California's provision on unavailability be amended to codify case law recognizing that a witness who refuses to testify is unavailable.

Finally, the Commission discusses forfeiture by wrongdoing as an exception to the hearsay rule. Due to a pending decision by the United States Supreme Court, the Commission has concluded that it would be premature to recommend any legislation on this topic at this time. After the Court issues its decision, the constitutional constraints will be more clear than at present, and there will be new analyses of the relevant policy considerations for the Legislature to consider. The Legislature should take no action until after it has the benefit of this guidance, which is expected by the end of June 2008.

To assist the Legislature when it determines how to proceed, this report describes and provides information on the possible approaches that the Commission investigated:

- Repeal California's existing provision on forfeiture by wrongdoing and replace it with a provision that tracks the constitutional minimum as articulated by the California Supreme Court.
- Replace the existing provision with one similar to the corresponding federal rule.
- Broaden the existing provision to some extent.
- Leave the law alone.

5. See Letter from Ellen Corbett, *supra* note 1.

If needed, the Commission could provide further analysis after the United States Supreme Court acts.

THE HEARSAY RULE AND ITS PURPOSE

The Evidence Code defines “hearsay evidence” as “evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.”⁶ Under this definition, evidence of a statement is not hearsay if it is offered for a purpose other than proving the truth of the statement.⁷

For example, suppose a hospital patient says that an object is blue and evidence of the statement is later offered in court. If the statement is offered to prove that the object in question was blue, then the statement is hearsay. If instead the statement is offered to prove that the patient was capable of speech, then the statement is not hearsay.

Except as otherwise provided by law, hearsay evidence is inadmissible.⁸ This is known as the hearsay rule.⁹

A principal reason for the hearsay rule is to exclude a statement when the truthfulness of the declarant cannot be tested through cross-examination.¹⁰ The process of cross-examination allows an opposing party to expose both inadvertent and conscious inaccuracies in perception and recollection.¹¹ Cross-examination has been described as “the

6. Evid. Code § 1200(a).

7. Evid. Code § 1200 Comment.

8. Evid. Code § 1200(b).

9. Evid. Code § 1200(c).

10. Evid. Code § 1200 Comment.

11. M. Méndez, *Evidence: The California Code and the Federal Rules* 166 (3d ed. 2004) (hereafter, “Méndez Treatise”).

‘greatest legal engine ever invented for the discovery of truth.’”¹²

A second reason for the hearsay rule is that court testimony is given under oath, while an out-of-court statement typically is not. As a ceremonial and religious symbol, an oath may cause a witness to feel a special obligation to speak the truth.¹³ It may also help make the witness aware of the possibility of criminal punishment for perjury.¹⁴

A third reason for the hearsay rule is that if a witness testifies before the trier of fact, that enables the trier of fact to take the demeanor of the witness into account in assessing credibility.”¹⁵ A person who sees, hears, and observes a witness may be convinced of, or unpersuaded of, the witness’ honesty, integrity, and reliability. Evaluating the credibility of a witness depends largely on intuition, “that intangible, inarticulable capacity of one human being to evaluate the

12. *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 Wigmore on Evidence § 1367). As the California Supreme Court has explained:

Through cross-examination, [a party] can raise doubts as to the general truthfulness of the witness and question the credibility of [the witness’] version of the facts. Also, the [witness’] memory and capacity for observation can be challenged. Prior inconsistent statements may be used to impeach credibility.

People v. Fries, 24 Cal. 3d 222, 231, 594 P.2d 19, 155 Cal. Rptr. 194 (1979).

In contrast, when a witness simply repeats someone else’s out-of-court statement, the witness is unable to explain any particulars, answer any questions, solve any difficulties, reconcile any contradictions, explain any obscurities, or clarify any ambiguities. C. McCormick, *Handbook of the Law of Evidence* 458-59 (1954).

13. McCormick, *supra* note 12, at 457.

14. *Id.*

15. Méndez Treatise, *supra* note 11, at 165-66. “A witness’s demeanor is ‘part of the evidence’ and is ‘of considerable legal consequence.’” *Elkins v. Superior Court*, 41 Cal. 4th 1337, 1358, 163 P.3d 160, 63 Cal. Rptr. 3d 483 (2007) (quoting *People v. Adams*, 19 Cal. App. 4th 412, 438, 23 Cal. Rptr. 2d 512 (1993)).

sincerity, honesty and integrity of another human being with whom he comes in contact.”¹⁶

In summary, the main reasons for excluding hearsay evidence are: (1) the opposing party has no opportunity to examine the declarant, (2) the declarant’s statement is not made under oath, and (3) the factfinder cannot observe the declarant’s demeanor. All three of these rationales reflect an overriding concern with enhancing the truth-finding function of the judicial system.

THE CONFRONTATION CLAUSE AND ITS PURPOSE

Another important limitation on the admissibility of evidence is the Confrontation Clause of the United States Constitution,¹⁷ which is binding on the states.¹⁸ In addition, the California Constitution contains its own Confrontation Clause.¹⁹

The California Supreme Court has held that the state constitutional right of confrontation is not coextensive with the corresponding federal right.²⁰ In other words, the Court has held that California is not bound to adopt the same

16. *Meiner v. Ford Motor Co.*, 17 Cal. App. 3d 127, 140-41, 94 Cal. Rptr. 702 (1971).

17. U.S. Const. amend. VI.

18. *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

19. Cal. Const. art. I, § 15.

20. *People v. Chavez*, 26 Cal. 3d 334, 351-52, 605 P.2d 401, 161 Cal. Rptr. 762 (1980); see also *In re Johnny G.*, 25 Cal. 3d 543, 556-59, 601 P.2d 196, 159 Cal. Rptr. 180 (1979) (Mosk, J., concurring). The California Supreme Court apparently has not revisited the *Chavez* ruling since the Truth-in-Evidence provision (Cal. Const. art. I, § 28(d)) was added to the California Constitution in 1982. For a case discussing the impact of the Truth-in-Evidence provision in another context, see *People v. May*, 44 Cal. 3d 309, 314, 748 P.2d 307, 243 Cal. Rptr. 369 (1988).

interpretation of its Confrontation Clause that the federal courts adopt with regard to the federal Confrontation Clause.²¹

The federal Confrontation Clause gives the defendant in a criminal case the right “to be confronted with the witnesses against him.”²² Similarly, the state’s Confrontation Clause gives the defendant in a criminal case the right “to be confronted with the witnesses against the defendant.”²³ Under either provision, the Confrontation Clause can be invoked only by a defendant in a criminal case.

The essential purpose of the federal Confrontation Clause is to give the defendant the opportunity to cross-examine adverse witnesses, which is essential to ensuring a fair trial.²⁴ The Clause calls for

a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which

21. “Nothing in the draftmen’s comments... suggests that they contemplated that state courts, in interpreting the state confrontation clause, would be invariably bound to adopt the same interpretation which federal courts may afford the federal confrontation guarantee.” *Chavez*, 26 Cal. 3d at 351.

This does not mean that federal precedents are irrelevant in interpreting the corresponding state provision. The California Supreme Court has noted that “while not controlling, the United States Supreme Court’s interpretation of similar provisions of the federal Constitution, like our sister state courts’ interpretations of similar state constitutional provisions, will provide valuable guidance in the interpretation of our state constitutional guarantees.” *Id.* at 352.

22. U.S. Const. amend. VI.

23. Cal. Const. art. I, § 15.

24. *Alvarado v. Superior Court*, 23 Cal. 4th 1121, 1137, 5 P.3d 203, 99 Cal. Rptr. 2d 149 (2000).

he gives his testimony whether he is worthy of belief.²⁵

Thus, the hearsay rule and the Confrontation Clause protect similar values. They both ensure that prosecution witnesses testify under oath, subject to cross-examination, and in the presence of the trier of fact.²⁶ The United States Supreme Court has made clear, however, that the Confrontation Clause is not a mere codification of the hearsay rule.²⁷ Admission of evidence in violation of the hearsay rule is not necessarily a violation of the right of confrontation.²⁸ Similarly, the Court has more than once found a Confrontation Clause violation even though the statement in question was admitted under a hearsay exception.²⁹

Under the Supremacy Clause of the United States Constitution,³⁰ if evidence is inadmissible under the federal Confrontation Clause, that result prevails and cannot be overridden by state law.³¹ The Evidence Code specifically acknowledges as much.³²

25. *Mattox v. United States*, 156 U.S. 237, 242-43 (1895); see also *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980).

26. Méndez, *Crawford v. Washington: A Critique*, 57 *Stan. L. Rev.* 569, 574 (2004); see also *California v. Green*, 399 U.S. 149, 157 (1970).

27. The Court's decisions "have never established such a congruence...." *Green*, 399 U.S. at 155.

28. *Id.* at 156.

29. *Id.* at 155-56.

30. U.S. Const. art. VI, § 2.

31. See, e.g., *Kater v. Maloney*, 459 F.3d 56, 62 (1st Cir. 2006) ("[U]nder the Constitution ... the states are free to adopt any number of different rules for criminal proceedings so long as the application of those rules does not violate federal constitutional requirements.").

32. "A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is

The federal Confrontation Clause thus establishes the minimum criteria for admissibility of an out-of-court statement. The Evidence Code and the California Constitution can impose additional requirements, but they cannot deny the fundamental protections afforded by the federal Confrontation Clause.

THE *CRAWFORD* AND *DAVIS* DECISIONS

The United States Supreme Court has recently issued two major decisions interpreting the federal Confrontation Clause: *Crawford v. Washington*,³³ and *Davis v. Washington*.³⁴ For many years before *Crawford*, the Court used the two-part test of *Ohio v. Roberts*³⁵ to determine whether a hearsay statement had “adequate indicia of reliability” and thus could be admitted at trial in the declarant’s absence without violating the Confrontation Clause. To meet this test, the hearsay statement had to either (1) fall within a “firmly rooted hearsay exception,” or (2) have “particularized guarantees of trustworthiness.”³⁶

In *Crawford*, the Court harshly criticized the *Roberts* test. It pointed out that the “principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”³⁷ The Court explained that in light of this purpose, the *Roberts* test is both overbroad and

inadmissible against the defendant under the Constitution of the United States or the State of California.” Evid. Code § 1204 (emphasis added).

33. 541 U.S. 36 (2004).

34. 547 U.S. 813, 126 S.Ct. 2266 (2006).

35. 448 U.S. 56 (1980).

36. *Id.* at 66.

37. 541 U.S. at 50.

overly narrow,³⁸ and so unpredictable that it does not provide meaningful protection even with respect to core confrontation violations.³⁹ According to the Court, the most serious vice of the *Roberts* test is not its unpredictability but rather “its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.”⁴⁰

The Court thus drew a distinction between a “testimonial statement” and other types of hearsay offered against an accused in a criminal case. The Court made clear that the *Roberts* test no longer applies to a testimonial statement. Under the Court’s new approach, it does not matter whether the statement falls within a firmly rooted exception to the hearsay rule, nor does it matter whether the statement falls under a new hearsay exception that bears particularized guarantees of trustworthiness. Rather, if the prosecution offers a testimonial statement as substantive evidence in a criminal case and the declarant does not testify at trial, the statement is admissible only if the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant.⁴¹ If those conditions are not met, admission of the statement would violate the Confrontation Clause.

The Court did not define the term “testimonial statement.”⁴² It just said that, at a minimum, the term encompasses a statement taken by a police officer in the course of an interrogation, and prior testimony at a preliminary hearing, grand jury proceeding, or former trial.⁴³

38. *Id.* at 60.

39. *Id.* at 62-63.

40. *Id.* at 63.

41. *Id.* at 53-54.

42. *Id.* at 51-52, 68.

43. *Id.* at 68.

In *Davis*, the Court provided guidance on when statements taken by police officers and related officials, such as 911 operators, constitute a testimonial statement. The Court held:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.⁴⁴

The Court also made clear that a nontestimonial statement is subject to traditional limitations upon hearsay evidence, but it is not subject to the federal Confrontation Clause.⁴⁵

THE DEFINITION OF UNAVAILABILITY

The hearsay rule has many exceptions.⁴⁶ In general, two justifications for these exceptions have been advanced.⁴⁷ First, there is the necessity rationale: An exception may be justified by identifying a special need for the evidence.⁴⁸ Second, there is the reliability rationale: An exception may be based on a belief that the circumstances under which a statement was made suggest that the statement is reliable to prove the truth of the matter stated.⁴⁹ These circumstances are considered an

44. 547 U.S. at ____, 126 S.Ct. at 2273-74.

45. *Id.* at 2273.

46. See Evid. Code §§ 1220-1380.

47. Méndez Treatise, *supra* note 11, at 191.

48. *Id.*

49. *Id.*

adequate substitute for the benefits of cross-examining the declarant under oath in the presence of the trier of fact.⁵⁰

Consistent with the necessity rationale, some exceptions to California's hearsay rule apply only if the declarant is unavailable.⁵¹ Similarly, some exceptions to the federal rule that prohibits hearsay evidence⁵² apply only if the declarant is unavailable.⁵³

To facilitate application of these exceptions, both the Evidence Code⁵⁴ and the Federal Rules of Evidence⁵⁵ define

50. *Id.*

51. See, e.g., Evid. Code §§ 1230 (declaration against interest), 1290-1292 (former testimony).

52. Fed. R. Evid. 802.

53. See Fed. R. Evid. 804(b).

54. Evidence Code Section 240 provides:

240. (a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:

(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.

(2) Disqualified from testifying to the matter.

(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.

(4) Absent from the hearing and the court is unable to compel his or her attendance by its process.

(5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.

(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying.

(c) Expert testimony which 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 may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term "expert" means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.

what it means for a declarant to be “unavailable.” The federal and the California definitions of “unavailability” are similar, but differ in certain respects. In particular, they differ in their approach to a witness who refuses to testify.⁵⁶

The introduction of evidence to establish the unavailability of a witness under this subdivision shall not be deemed procurement of unavailability, in absence of proof to the contrary.

55. Federal Rule of Evidence 804(a) provides:

804. (a) Definition of unavailability. “Unavailability as a witness” includes situations in which the declarant —

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant’s statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

56. There are also several other distinctions between the California statute and the corresponding federal rule on unavailability of a declarant. For information on these points, see Commission Staff Memorandum 2005-6 (Jan. 6, 2005), p. 11; Commission Staff Memorandum 2004-45 (Aug. 31, 2004), pp. 43-44; Commission Staff Memorandum 2003-7 (Feb. 25, 2003), pp. 9-11.

One of the distinctions is that the federal rule, unlike the California statute, says that a declarant is unavailable if the declarant “testifies to a lack of memory of the subject matter of the declarant’s statement.” See Fed. R. Evid. 804(a)(3). In this study, the Commission tentatively recommended that California adopt the federal approach on this point. Tentative Recommendation on *Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing* (Oct. 2007), pp. 9-10, 35-36. Due to concerns raised in a comment, the Commission has withdrawn that proposal for further study. See Commission Staff Memorandum 2008-2, p. 7 & Exhibit pp. 5-6; Minutes of Jan. 17, 2008, Commission Meeting, p. 3.

Unavailability of a Person Who Refuses to Testify

The federal rule provides that a witness is unavailable if the witness refuses to testify despite a court order to do so.⁵⁷ The California statute does not expressly address this situation,⁵⁸ but case law does.

As a practical matter, a witness who refuses to testify after the court takes reasonable steps to require such testimony is as inaccessible as a witness who is unable to attend the hearing. For example, in a leading California case, a witness refused to testify for fear of his safety and the safety of his family.⁵⁹ The witness persisted in this position even after he was held in contempt of court. Based on these facts, the trial court found that the witness was unavailable for purposes of the former testimony exception to the hearsay rule.

The California Supreme Court upheld that ruling.⁶⁰ Because the California statute on unavailability does not expressly cover a refusal to testify, however, the Court's determination that the witness was unavailable was based on the provision that applies when a witness is "unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity."⁶¹ Specifically, the Court ruled that a trial court is permitted to "consider whether a mental state induced by fear of personal or family harm is a 'mental infirmity' that

57. Fed. R. Evid. 804(a)(2).

58. See Evid. Code § 240. Although the statute does not expressly address a refusal to testify, it does expressly address a failure to appear. See subdivision (a)(4) (declarant is unavailable if absent from hearing and court cannot compel declarant's attendance by its process) and subdivision (a)(5) (declarant is unavailable if absent from hearing and proponent of statement has exercised reasonable diligence but has been unable to compel declarant's attendance by court's process).

59. *People v. Rojas*, 15 Cal. 3d 540, 542 P.2d 229, 125 Cal. Rptr. 357 (1975).

60. *Id.* at 547-52.

61. Evid. Code § 240(a)(3).

renders the person harboring the fear unavailable as a witness.”⁶²

It would be more straightforward if the California statute, like the federal provision, expressly recognized that a witness who refuses to testify is unavailable.⁶³ The Law Revision Commission recommends that California’s provision on unavailability be amended in that manner.⁶⁴

Need for the Reform

This reform relating to a refusal to testify was advisable before *Crawford* was decided.⁶⁵ To some extent, *Crawford* has reinforced the need for the reform.

The new approach to the Confrontation Clause enunciated in *Crawford* made some prosecutions more difficult than they would have been in the past.⁶⁶ Key evidence in a case may be characterized as testimonial. If so, the evidence is inadmissible under *Crawford* unless the declarant testifies at

62. *Rojas*, 15 Cal. 3d at 551.

63. Méndez, *California Evidence Code — Federal Rules of Evidence, Part I. Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 351, 357 (2003) (hereafter, “Méndez Hearsay Analysis”).

64. See proposed amendment to Evid. Code § 240 *infra*. The language used in the proposed new paragraph on refusal to testify (proposed paragraph (a)(6)) tracks the language used in Federal Rule of Evidence 804(a)(2). The proposed amendment would thus offer the benefits of uniformity.

The proposed Comment refers to cases discussing whether a witness was unavailable due to a refusal to testify. If the proposed amendment is enacted, these references in the Comment will enable judges and other persons to readily access the pertinent case law. The Comment will be entitled to great weight in construing the statute. See *2006-2007 Annual Report*, 36 Cal. L. Revision Comm’n Reports 1, 18-24 (2006) & sources cited therein.

65. See Minutes of March 7, 2003, Commission Meeting, pp. 10-11.

66. Tuerkheimer, *Forfeiture in the Domestic Violence Realm* (2007), <http://www.texasrev.com/seealso/pdfs/85TexasLRevSeeAlso49.pdf>.

Prof. Tuerkheimer’s online article is reproduced in Commission Staff Memorandum 2008-7 (Feb. 11, 2008), Exhibit pp. 2-7.

trial, or the declarant is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the declarant.⁶⁷

For example, a prosecution for domestic violence, child abuse, or criminal conspiracy may rely on a hearsay statement of an unavailable witness.⁶⁸ These cases are particularly affected by *Crawford* because the victim is often reluctant to testify, prone to recant a prior statement, or considered too young to testify.⁶⁹

67. As Prof. Tuerkheimer explains:

Before the Supreme Court's reinterpretation of the Confrontation Clause, prosecuting domestic violence without the testimony of a victim (known as "victimless" prosecution) by using various hearsay exceptions to admit her out-of-court statements had become commonplace. The Court's decisions in *Crawford v. Washington* and *Davis v. Washington* have transformed this landscape. Because the designation of a statement as "testimonial" now subjects it to exclusion, the viability of a significant number of formerly prosecutable domestic violence cases has been undermined.

Id. at 49-50.

68. Flanagan, *Confrontation, Equity, and the Misnamed Exception for "Forfeiture" by Wrongdoing*, 14 Wm. & Mary Bill Rts. J. 1193, 1194 (2006).

69. *Id.*; see also McKinstry, "An Exercise in Fiction": *The Sixth Amendment Confrontation Clause, Forfeiture by Wrongdoing, and Domestic Violence in Davis v. Washington*, 30 Harv. J. L. & Gender 531, 531-32 (2007); Percival, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington*, 79 S. Cal. L. Rev. 213, 215-16, 235-37 (2005).

It has been estimated, for instance, that about "80% of domestic violence victims refuse to testify or recant their earlier statements to the police about the violent incident for which the defendant is charged." King-Ries, 39 Creighton L. Rev. 441, 458 (2006); see also Percival, *supra*, at 235 ("Most jurisdictions report that in the overwhelming majority of domestic violence cases, victims recant the testimony that was given to law enforcement immediately following the violent event, and many victims refuse to continue cooperating with the prosecution.").

It has also been noted, however, that many techniques are available to address the reasons for a domestic violence victim's refusal to testify. Some data suggests that by using a combination of these techniques, between 65% and 95% of domestic violence victims will fully cooperate with the prosecution. Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases*:

Concern about the impact of *Crawford* on these types of cases was considerably alleviated by *Davis*, which clarified that a statement is not testimonial if it is made during a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable the police to meet an ongoing emergency.⁷⁰ For example, if a person makes a 911 call for help against a bona fide, ongoing physical threat, and the 911 operator elicits statements that are given under unsafe conditions and are necessary to resolve the present emergency, the statements are nontestimonial and thus can be admitted without satisfying the *Crawford* requirements.⁷¹

Concern about the impact of *Crawford* could be further alleviated by amending California's statute on unavailability to expressly state that a witness who refuses to testify despite a court order is unavailable for purposes of the hearsay rule. That would not represent a substantive change in existing law,⁷² but it would facilitate reference to the applicable rules. Courts, attorneys, litigants, and others could simply refer to the text of the statute, without having to search and explain case law on these matters. Amending the statute in that manner would thus help courts and other persons determine whether the requirement of unavailability for certain hearsay exceptions is met.

Guarantee to Action or Dangerous Solution, 63 Fordham L. Rev. 853, 873 (1994).

70. 126 S.Ct. at 2273.

71. *Id.* at 2276-77.

72. See, e.g., *People v. Rojas*, 15 Cal. 3d 540, 542 P.2d 229, 125 Cal. Rptr. 357 (1975) (witness who appeared in court but refused to testify was unavailable); *People v. Francis*, 200 Cal. App. 3d 579, 245 Cal. Rptr. 923 (1988) (same); *People v. Walker*, 145 Cal. App. 3d 886, 893-94, 193 Cal. Rptr. 812 (1983) (same); *People v. Sul*, 122 Cal. App. 3d 355, 175 Cal. Rptr. 893 (1981) (same).

FORFEITURE BY WRONGDOING

Sometimes, a defendant facing serious charges will arrange for a key adverse witness to be murdered. In other cases, a defendant may threaten such a witness or the witness' family, so that the witness refuses to testify or flees the jurisdiction and cannot be brought to court. A defendant may also engage in other types of wrongdoing that renders a witness unavailable at trial.

To address such misconduct, California and some other jurisdictions have adopted a forfeiture by wrongdoing exception to the hearsay rule. In specified circumstances, such an exception allows an out-of-court statement by an unavailable declarant to be admitted at trial over a hearsay objection. A closely related doctrine is the forfeiture by wrongdoing exception to the constitutional right of confrontation.

The discussion below (1) describes existing law on the forfeiture by wrongdoing exception to the hearsay rule, (2) discusses the forfeiture by wrongdoing exception to the Confrontation Clause, (3) recounts recent interest in revising California's forfeiture by wrongdoing exception to the hearsay rule and explains why such action would be premature at this time, (4) provides information about some possible approaches for the Legislature to consider in the future, and (5) offers a few general suggestions regarding how the Legislature should proceed.

Existing Law on Forfeiture by Wrongdoing as an Exception to the Hearsay Rule

Both the Evidence Code and the Federal Rules of Evidence include a hearsay rule exception based on a defendant's misconduct that causes a witness to be unavailable. The scope of those exceptions is quite different.

California Approach

The California provision, Evidence Code Section 1350, is detailed and incorporates many safeguards to ensure that it is only invoked where there is strong evidence that a criminal defendant engaged in egregious conduct to prevent a witness from testifying.⁷³ The provision was enacted in 1985 to

73. Evidence Code Section 1350 provides:

1350. (a) In a criminal proceeding charging a serious felony, evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness, and all of the following are true:

(1) There is clear and convincing evidence that the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution of the party and is the result of the death by homicide or the kidnapping of the declarant.

(2) There is no evidence that the unavailability of the declarant was caused by, aided by, solicited by, or procured on behalf of, the party who is offering the statement.

(3) The statement has been memorialized in a tape recording made by a law enforcement official, or in a written statement prepared by a law enforcement official and signed by the declarant and notarized in the presence of the law enforcement official, prior to the death or kidnapping of the declarant.

(4) The statement was made under circumstances which indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion.

(5) The statement is relevant to the issues to be tried.

(6) The statement is corroborated by other evidence which tends to connect the party against whom the statement is offered with the commission of the serious felony with which the party is charged.

The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

(b) If the prosecution intends to offer a statement pursuant to this section, the prosecution shall serve a written notice upon the defendant at least 10 days prior to the hearing or trial at which the prosecution intends to offer the statement, unless the prosecution shows good cause for the failure to provide that notice. In the event that good cause is shown, the defendant shall be entitled to a reasonable continuance of the hearing or trial.

(c) If the statement is offered during trial, the court's determination shall be made out of the presence of the jury. If the defendant elects to

address what is known as the “murdered witness problem” — the unfortunate reality that “serious charges are dismissed, lost or reduced every year because of the unavailability of prosecution witnesses who have been murdered or kidnapped by the persons against whom they would testify.”⁷⁴

Federal Approach

The corresponding federal provision, Federal Rule of Evidence 804(b)(6), was enacted only ten years ago. It is broader in scope than the California provision, but it is far less detailed. It creates a hearsay rule exception for a statement that 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.”⁷⁵ The

testify at the hearing on a motion brought pursuant to this section, the court shall exclude from the examination every person except the clerk, the court reporter, the bailiff, the prosecutor, the investigating officer, the defendant and his or her counsel, an investigator for the defendant, and the officer having custody of the defendant. Notwithstanding any other provision of law, the defendant’s testimony at the hearing shall not be admissible in any other proceeding except the hearing brought on the motion pursuant to this section. If a transcript is made of the defendant’s testimony, it shall be sealed and transmitted to the clerk of the court in which the action is pending.

(d) As used in this section, “serious felony” means any of the felonies listed in subdivision (c) of Section 1192.7 of the Penal Code or any violation of Section 11351, 11352, 11378, or 11379 of the Health and Safety Code.

(e) If a statement to be admitted pursuant to this section includes hearsay statements made by anyone other than the declarant who is unavailable pursuant to subdivision (a), those hearsay statements are inadmissible unless they meet the requirements of an exception to the hearsay rule.

74. *Dalton v. Superior Court*, 19 Cal. App. 4th 1506, 1511, 24 Cal. Rptr. 2d 248 (1993) (quoting Assembly Floor Analysis of AB 2059 (1985-86)). The Law Revision Commission was not involved in drafting Evidence Code Section 1350.

75. According to the advisory committee’s note, the provision was added “to provide that a party forfeits the right to object on hearsay grounds to the

provision is intended as a “prophylactic rule” to deal with abhorrent behavior that strikes at the heart of the justice system.⁷⁶

Differences Between the California Approach and the Federal Approach

There are numerous distinctions between the California provision and the federal rule on forfeiture by wrongdoing:

- **Type of Case in Which the Exception Applies.** The California provision applies only in “a criminal proceeding charging a serious felony.”⁷⁷ The federal rule applies in any type of case, civil or criminal.⁷⁸
- **Party Against Whom the Exception May Be Invoked.** The California provision can be invoked against a party who wrongfully sought to prevent the arrest or prosecution of the party.⁷⁹ There does not seem to be any basis for invoking the California provision against the government. In contrast, the federal rule “applies to all parties, including the government.”⁸⁰
- **Reason for the Declarant’s Unavailability.** The California provision applies only when the declarant’s unavailability “is the result of the death by homicide or the kidnapping of the declarant.”⁸¹ Under the

admission of a declarant’s prior statement when the party’s deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness.”

The Uniform Rules of Evidence contain a provision that is almost identical to the federal rule. See Unif. R. Evid. 804(b)(5).

76. Fed. R. Evid. 804(b)(6) advisory committee’s note (quoting *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982)).

77. Evid. Code § 1350(a).

78. See Fed. R. Evid. 804(b)(6).

79. Evid. Code § 1350(a)(1).

80. Fed. R. Evid. 804(b)(6) advisory committee’s note.

81. Evid. Code § 1350(a)(1).

federal rule, “[t]he wrongdoing need not consist of a criminal act.”⁸²

- **Acquiescence in Wrongdoing that Results in the Declarant’s Unavailability.** The California provision applies only when “the declarant’s unavailability was *knowingly caused by, aided by, or solicited by* the party against whom the statement is offered....”⁸³ In contrast, under the federal rule it is sufficient if a party “has engaged *or acquiesced* in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”⁸⁴
- **Standard of Proof.** The California provision requires “*clear and convincing evidence* that the declarant’s unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution of the party and is the result of the death by homicide or the kidnapping of the declarant.”⁸⁵ The federal rule does not expressly state the applicable standard of proof, but the advisory committee’s note explains that the “usual Rule 104(a) *preponderance of the evidence standard* has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage.”⁸⁶
- **Evidence that the Proponent of the Hearsay Statement Is Responsible for the Declarant’s Unavailability.** The California provision cannot be invoked if there is “evidence that the unavailability of the declarant was caused by, aided by, solicited by, or procured on behalf of, the party who is offering the

82. Fed. R. Evid. 804(b)(6) advisory committee’s note.

83. Evid. Code § 1350(a)(1) (emphasis added).

84. Fed. R. Evid. 804(b)(6) (emphasis added).

85. Evid. Code § 1350(a)(1) (emphasis added).

86. Fed. R. Evid. 804(b)(6) advisory committee’s note (emphasis added).

statement.”⁸⁷ The federal rule does not include such a limitation.⁸⁸

- **Form of the Hearsay Statement.** The California provision applies only if the hearsay statement “has been memorialized in a tape recording made by a law enforcement official, or in a written statement prepared by a law enforcement official and signed by the declarant and notarized in the presence of the law enforcement official, prior to the death or kidnapping of the declarant.”⁸⁹ The federal rule does not impose any limitations on the form of the hearsay statement.⁹⁰
- **Circumstances Under Which the Hearsay Statement Was Made.** The California provision can be invoked only if the hearsay statement “was made under circumstances which indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion.”⁹¹ The federal rule does not include such a limitation.⁹²
- **Relevance of the Hearsay Statement.** The California provision expressly states that the hearsay statement must be “relevant to the issues to be tried.”⁹³ The federal rule includes no such language.⁹⁴ In both contexts, such language is unnecessary due to the general prohibition on introducing irrelevant evidence.⁹⁵

87. Evid. Code § 1350(a)(2).

88. See Fed. R. Evid. 804(b)(6).

89. Evid. Code § 1350(a)(3).

90. See Fed. R. Evid. 804(b)(6).

91. Evid. Code § 1350(a)(4).

92. See Fed. R. Evid. 804(b)(6).

93. Evid. Code § 1350(a)(5).

94. See Fed. R. Evid. 804(b)(6).

95. See Evid. Code § 350 (“No evidence is admissible except relevant evidence.”); Fed. R. Evid. 402 (“Evidence which is not relevant is not admissible.”).

- **Evidence Connecting the Defendant to Commission of the Serious Felony Charged.** Under the California provision, the hearsay statement cannot be the sole evidence that connects the defendant to the serious felony charged against the defendant. Rather, the statement is admissible only if it “is corroborated by other evidence which tends to connect the party against whom the statement is offered with the commission of the serious felony with which the party is charged.”⁹⁶ “The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.”⁹⁷ The federal rule includes no such requirement.⁹⁸
- **Notice of Intent to Invoke the Forfeiture by Wrongdoing Exception.** The California provision requires the prosecution to notify the defendant ten days before the prosecution offers a hearsay statement under the provision.⁹⁹ The federal rule does not require a party to give advance notice of intent to invoke the rule.¹⁰⁰
- **Procedure for Determining Whether the Exception Applies.** The California provision expressly states that if a hearsay statement is offered under it during trial, “the court’s determination shall be made out of the presence of the jury.”¹⁰¹ The provision also gives guidance on what procedure to use if the defendant elects to testify in connection with that

96. Evid. Code § 1350(a)(6).

97. *Id.*

98. See Fed. R. Evid. 804(b)(6).

99. Evid. Code § 1350(b). There is a good cause exception to the notice requirement, but if good cause is shown “the defendant shall be entitled to a reasonable continuance of the hearing or trial.” *Id.*

100. See Fed. R. Evid. 804(b)(6).

101. Evid. Code § 1350(c).

determination.¹⁰² The federal rule does not provide guidance on these points.¹⁰³

- **Multiple Hearsay.** The California provision expressly states that if the proffered statement “includes hearsay statements made by anyone other than the declarant who is unavailable ..., those hearsay statements are inadmissible unless they meet the requirements of an exception to the hearsay rule.”¹⁰⁴ The federal rule includes no such language,¹⁰⁵ but the general rule governing multiple hearsay would seem to apply.¹⁰⁶
- **Use of Proffered Statement in Determining Whether Exception Applies.** The California provision and the federal rule also differ in the extent to which they permit the court to consider the proffered statement in determining whether the exception applies.¹⁰⁷

In summary, California’s hearsay exception for forfeiture by wrongdoing is narrower and incorporates more restrictions than the corresponding federal rule. The many restrictions in the California provision “evince an abundance of caution when abolishing the right of criminal defendants to object to hearsay even when they have been charged with bringing about the hearsay declarant’s unavailability as a witness.”¹⁰⁸

102. *Id.*

103. See Fed. R. Evid. 804(b)(6).

104. Evid. Code § 1350(e).

105. See Fed. R. Evid. 804(b)(6).

106. See Fed. R. Evid. 805. California has a similar provision. See Evid. Code § 1201.

107. See *infra* note 195 & accompanying text.

108. Méndez Hearsay Analysis, *supra* note 63, at 390.

Other Jurisdictions

Six states have adopted laws or court rules identical to the federal exception for forfeiture by wrongdoing.¹⁰⁹ In addition to mirroring the language used in the federal provision, several of these state provisions have comments that explicitly say the state and federal provisions are identical.¹¹⁰

Four other states have adopted provisions similar but not identical to the federal exception: Connecticut,¹¹¹ Michigan,¹¹² Ohio,¹¹³ and Tennessee.¹¹⁴ Each of these states omits the

109. Del. R. Evid. 804(b)(6); Ky. R. Evid. 804(b)(5); N.M. R. Evid. 11-804(B)(5); N.D. R. Evid. 804(b)(6); Pa. R. Evid. 804(b)(6); Vt. R. Evid. 804(b)(6).

110. Comment to Del. R. Evid. 804(b)(6) (“D.R.E. 804(b)(6) tracks F.R.E. 804(b)(6).”); Comment to N.M. R. Evid. 11-804(B)(5) (“The new exception added to Subparagraph (5) of Paragraph B is taken verbatim from federal rule 804(b)(6)...”); Comment to Pa. R. Evid. 804(b)(6) (“Pa.R.E. 804(b)(6) is identical to F.R.E. 804(b)(6).”); Comment to Vt. R. Evid. 804(b)(6) (“The rule is identical to the 1997 amendment to the Federal Rules of Evidence which added F.R.E. 804(b)(6)”).

111. The Connecticut provision states:

Conn. Evid. Code § 8-6. Hearsay Exceptions: Declarant Must Be Unavailable

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

....

(8) Forfeiture by wrongdoing. A statement offered against a party that has engaged in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

112. The Michigan provision states:

Mich. R. Evid. 804(b). Hearsay exceptions

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

....

(6) Statement by declarant made unavailable by opponent. A statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

113. The Ohio provision states:

Ohio R. Evid. 804(B). Hearsay exceptions

reference to having “acquiesced in” wrongdoing;¹¹⁵ Michigan substitutes a reference to having “encouraged” wrongdoing.¹¹⁶ Ohio requires the proponent of the hearsay statement to give the adverse party advance notice of intent to use the statement at trial.¹¹⁷

Three other states have provisions quite different from the federal exception. In Hawaii, it is sufficient that a party “procured the unavailability of the declarant as a witness.”¹¹⁸ Apparently, it is not necessary to show that the party intended to procure the unavailability of the declarant.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

....

(6) Forfeiture by wrongdoing. A statement offered against a party if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying. However, a statement is not admissible under this rule unless the proponent has given to each adverse party advance written notice of an intention to introduce the statement sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement.

114. The Tennessee provision states:

Tenn. R. Evid. 804(b). Hearsay Exceptions

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

....

(6) Forfeiture by Wrongdoing. A statement offered against a party that has engaged in wrongdoing that was intended to and did procure the unavailability of the declarant as a witness.

115. See *supra* notes 111-14.

116. See *supra* note 112.

117. See *supra* note 113.

118. The Hawaii provision states:

Haw. R. Evid. 804(b). Hearsay exceptions

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

....

(7) Forfeiture by wrongdoing. A statement offered against a party that has procured the unavailability of the declarant as a witness.

Oregon draws a distinction between when a party intentionally or knowingly engages in criminal conduct that causes death, incapacity, or incompetence of the declarant, and when a party engages in, directs, or otherwise participates in wrongful conduct that causes the declarant to be unavailable.¹¹⁹ In the latter situation, the proponent of the hearsay statement must show that the declarant intended to cause the declarant to be unavailable as a witness.¹²⁰ Such proof is not required in the former situation.¹²¹

Finally, Maryland has two different hearsay exceptions for forfeiture by wrongdoing, one for a civil case¹²² and the other

119. The Oregon provision states:

Or. Rev. Stat. § 40.465(3)

The following are not excluded by ORS 40.455 if the declarant is unavailable as a witness:

....

(f) A statement offered against a party who intentionally or knowingly engaged in criminal conduct that directly caused the death of the declarant, or directly caused the declarant to become unavailable as a witness because of incapacity or incompetence.

(g) A statement offered against a party who engaged in, directed or otherwise participated in wrongful conduct that was intended to cause the declarant to be unavailable as a witness, and did cause the declarant to be unavailable.

120. See *supra* note 119.

121. *Id.*

122. Maryland Rule 5-804(5), which pertains to forfeiture by wrongdoing in civil actions, provides:

Witness Unavailable Because of Party's Wrongdoing

(A) Civil Actions. In civil actions in which a witness is unavailable because of a party's wrongdoing, a statement that (i) was (a) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (b) reduced to writing and was signed by the declarant; or (c) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement, and (ii) is offered against a party who has engaged in, directed, or conspired to commit wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness, provided however the statement may not be admitted unless, as soon as practicable after the proponent of the statement learns that the declarant will be

for a criminal case.¹²³ Both of these exceptions are detailed and, like California's forfeiture by wrongdoing exception,

unavailable, the proponent makes known to the adverse party the intention to offer the statement and the particulars of it.

(B) Criminal Causes. In criminal causes in which a witness is unavailable because of a party's wrongdoing, admission of the witness's statement under this exception is governed by Code, Courts Article, § 10-901.

123. Maryland Courts and Judicial Procedure Code § 10-901, which pertains to criminal actions, provides:

Hearsay evidence; witnesses unavailable due to wrongdoing

(a) During the trial of a criminal case in which the defendant is charged with a felonious violation of Title 5 of the Criminal Law Article or with the commission of a crime of violence as defined in § 14-101 of the Criminal Law Article, a statement as defined in Maryland Rule 5-801(a) is not excluded by the hearsay rule if the statement is offered against a party that has engaged in, directed, or conspired to commit wrongdoing that was intended to and did procure the unavailability of the declarant of the statement, as defined in Maryland Rule 5-804.

(b) Subject to subsection (c) of this section, before admitting a statement under this section, the court shall hold a hearing outside the presence of the jury at which:

(1) The Maryland Rules of Evidence are strictly applied; and

(2) The court finds by clear and convincing evidence that the party against whom the statement is offered engaged in, directed, or conspired to commit the wrongdoing that procured the unavailability of the declarant.

(c) A statement may not be admitted under this section unless:

(1) The statement was:

(i) Given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(ii) Reduced to writing and signed by the declarant; or

(iii) Recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement; and

(2) As soon as is practicable after the proponent of the statement learns that the declarant will be unavailable, the proponent notifies the adverse party of:

(i) The intention to offer the statement;

(ii) The particulars of the statement; and

(iii) The identity of the witness through whom the statement will be offered.

provide safeguards that are not present in the federal exception.¹²⁴

The remaining thirty-six states do not have a statute or court rule on forfeiture by wrongdoing as an exception to the hearsay rule.¹²⁵ A few of these states have recently investigated the possibility of adopting such a provision, but do not yet appear to have done so.¹²⁶

124. See *supra* notes 122-23.

125. These states are Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, Virginia, West Virginia, Wisconsin, Wyoming.

126. In Washington, a bill (HB 1508) to enact a provision like the federal exception for forfeiture by wrongdoing was introduced in 2005. It was not enacted.

Similarly, the Montana Supreme Court has been investigating the possibility of adopting a rule like the federal exception. See *Supreme Court Amends the Rules of Evidence*, 32 Mont. Law. 26, 26-27 (Aug. 2007).

The Evidence Rules Advisory Committee in Idaho has extensively studied this matter. After considering several different approaches, it recommended the following provision:

(5) Forfeiture by wrongdoing

(a) A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, prevent the testimony of the declarant as a witness, provided that the party offering the statement shall file and serve notice reasonably in advance of trial or during the trial if the court excuses pretrial notice on good cause shown, of the party's intent to rely upon this exception and the evidence it intends to present to establish the evidence's admissibility under this exception.

(b) The determination of the admissibility of the evidence shall be held outside the presence of the jury. The proponent of the evidence has the burden of proving the applicability of this exception by a preponderance of the evidence when the statement is offered in a civil matter or by a defendant in a criminal case. Clear and convincing evidence is required if the statement is offered against a defendant in a criminal case.

See Evidence Rules Advisory Committee, Minutes of Meeting on Nov. 9, 2007 (available at www.isc.idaho.gov/rules/IRE-CommMin-1107.html).

Forfeiture by Wrongdoing Exception to the Confrontation Clause

In determining whether to revise California law on forfeiture by wrongdoing as an exception to the hearsay rule, it is necessary to consider the constitutional constraints imposed by the Confrontation Clause.

If hearsay evidence is admitted against a criminal defendant pursuant to Evidence Code Section 1350 or Federal Rule of Evidence 804(b)(6), the defendant has no opportunity to cross-examine the declarant. If the hearsay evidence is testimonial, does this deprive the defendant of the constitutional right of confrontation?

Key case law on this point is discussed below.

Early Decisions by the United States Supreme Court

Although the Confrontation Clause generally gives a defendant the right to confront an adverse witness, the United States Supreme Court has long recognized an exception when the defendant has taken steps to prevent a witness from testifying. As the Court explained in *Reynolds v. United States*,¹²⁷

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is 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. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some

127. 98 U.S. 145, 158 (1878).

lawful way, he is in no condition to assert that his constitutional rights have been violated.

The Court further explained that the forfeiture exception “has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony.”¹²⁸ In several later cases, the Court mentioned the forfeiture exception, but did not provide much more guidance on its contours.¹²⁹

Recent Decisions by the United States Supreme Court

When it decided *Crawford* in 2004, the Court made clear that the new approach it took in that case did not negate the forfeiture exception to the Confrontation Clause. After carefully distinguishing between hearsay exceptions that do and do not “claim to be a surrogate means of assessing reliability,” the Court explained that “the rule of forfeiture by wrongdoing (*which we accept*) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternate means of determining reliability.”¹³⁰

In *Davis*, the hearsay proponents and several amici contended that a testimonial statement should be more readily admissible in a domestic violence case than in other cases because that “particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.”¹³¹ In responding to that

128. *Id.* at 159.

129. See *Diaz v. United States*, 223 U.S. 442, 449-53 (1912), *West v. Louisiana*, 194 U.S. 258, 265-67 (1904); *Motes v. United States*, 178 U.S. 458, 471-74 (1900); *Mattox v. United States*, 156 U.S. 237, 242 (1895); *Eureka Lake & Yuba Canal Co. v. Superior Court*, 116 U.S. 410, 418 (1886).

130. *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (emphasis added).

131. *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 2279-80 (2006).

contention, the Court did not establish a special rule applicable to a testimonial statement in a domestic violence case. It did, however, discuss the forfeiture exception to the Confrontation Clause in some detail:

[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*: that “the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds.” That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

We take no position on the standards necessary to demonstrate such forfeiture, but federal courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance-of-the-evidence standard. State courts tend to follow the same practice. Moreover, if a hearing on forfeiture is required, [a Massachusetts case] observed that “hearsay evidence, including the unavailable witness’s out-of-court statements, may be considered.” The *Roberts* approach to the Confrontation Clause undoubtedly made recourse to this doctrine less necessary, because prosecutors could show the “reliability” of *ex parte* statements more easily than they could show the defendant’s procurement of the witness’s absence. *Crawford*, in overruling *Roberts*, did not destroy the ability of courts to protect the integrity of their proceedings.

We have determined that, absent a finding of forfeiture by wrongdoing, the Sixth Amendment operates to exclude Amy Hammon’s affidavit. The

Indiana courts may (if they are asked) determine on remand whether such a claim of forfeiture is properly raised and, if so, whether it is meritorious.¹³²

Recent Decision by the California Supreme Court

A recent decision by the California Supreme Court provides further guidance on the scope of the forfeiture by wrongdoing exception to the federal Confrontation Clause. In *People v. Giles*,¹³³ the defendant admitted killing his ex-girlfriend, but he claimed to have acted in self-defense.¹³⁴ Over his objection, “the trial court admitted the victim’s prior statements to a police officer who had been investigating a report of domestic violence involving defendant and the victim.”¹³⁵ In those statements, the victim described an incident that allegedly occurred a few weeks before the killing. She said that the defendant “had held a knife to her and threatened to kill her.”¹³⁶

The Court concluded that the defendant “forfeited his confrontation clause challenge to the victim’s prior out-of-court statements to the police.”¹³⁷ In reaching that conclusion, the Court addressed a number of important issues.

First, the defendant argued that the forfeiture by wrongdoing exception to the Confrontation Clause was inapplicable because there was no showing that the defendant killed the victim “*with the intent of preventing her testimony*

132. *Id.* at 2280 (citations omitted, emphasis in original).

133. 40 Cal. 4th 833, 152 P.3d 433, 55 Cal. Rptr. 3d 133 (2007), *cert. granted*, 76 U.S.L.W. 3364, 3371 (U.S. Jan. 11, 2008) (No. 07-6053).

134. *Id.* at 837.

135. *Id.*

136. *Id.*

137. *Id.* at 855.

at a pending or potential trial.”¹³⁸ The Court discussed this point at length and ultimately concluded that it is not necessary to show an intent to prevent testimony to invoke the forfeiture exception to the Confrontation Clause:

Although courts have traditionally applied the forfeiture rule to witness tampering cases, forfeiture principles can and should logically and equitably be extended to other types of cases in which an intent-to-silence element is missing. As the Court of Appeal here stated, “Forfeiture is a logical extension of the equitable principle that no person should benefit from his own wrongful acts. A defendant whose intentional criminal act renders a witness unavailable for trial benefits from his crime if he can use the witness’s unavailability to exclude damaging hearsay statements by the witness that would otherwise be admissible. *This is so whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable.*”¹³⁹

Thus, the Court concluded it is enough to show that the witness is genuinely unavailable to testify and the defendant’s intentional criminal act caused that unavailability.¹⁴⁰

Second, the Court considered “whether the doctrine of forfeiture by wrongdoing applies where the alleged wrongdoing *is the same as the offense for which defendant was on trial.*”¹⁴¹ In a classic witness tampering case, “the defendant is *not* on trial for the same wrongdoing that caused the forfeiture of his confrontation right, but rather for a prior underlying crime about which the victim was about to

138. *Id.* at 841 (emphasis added).

139. *Id.* at 849 (emphasis added).

140. *Id.* at 854.

141. *Id.* at 851 (emphasis added).

testify.”¹⁴² In *Giles*, however, the defendant was on trial for murder, the same wrongdoing that the prosecution pointed to in contending that the defendant had forfeited his right of confrontation. The argument against extending the forfeiture exception to such a situation is that “in ruling on the evidentiary matter, a trial court is required, in essence, to make *the same determination of guilt of the charged crime as the jury.*”¹⁴³

The Court rejected that argument, explaining that the presumption of innocence and right to jury trial will not be violated because the jury will not know of the judge’s preliminary finding and will use different information and a different standard of proof in deciding the defendant’s guilt.¹⁴⁴ Consistent with that conclusion, the Court made clear that the jury should not be informed of the judge’s preliminary finding that the defendant committed an intentional criminal act.¹⁴⁵

Third, the Court considered what standard applies in proving the facts necessary to invoke the forfeiture exception under the federal Confrontation Clause. The defendant argued that those facts must be proved by *clear and convincing evidence*. The Court disagreed. It noted that the “majority of the lower federal courts have held that the applicable standard necessary for the prosecutor to demonstrate forfeiture by wrongdoing is *by a preponderance of the evidence.*”¹⁴⁶ The Court endorsed that standard, explaining that the Constitution

142. *Id.* (emphasis added).

143. *Id.* (emphasis added).

144. *Id.* (quoting *United States v. Mayhew*, 380 F. Supp. 2d 961, 968 (S.D. Ohio 2005)).

145. *Id.* at 854.

146. *Id.* at 852 (emphasis added).

only requires proof that it is more probable than not that the defendant procured the declarant's unavailability.¹⁴⁷

Fourth, the Court discussed whether the proffered hearsay statement can be considered in determining whether the forfeiture exception applies. The Court concluded that the statement can be considered, subject to a limitation. Specifically, the Court cautioned that "a trial court cannot make a forfeiture finding based solely on the unavailable witness's unfronted testimony; there must be independent corroborative evidence that supports the forfeiture finding."¹⁴⁸

Finally, the Court made clear that its decision simply outlines the requirements of the Confrontation Clause; it does not foreclose the possibility that the Evidence Code imposes additional restrictions on the admissibility of a hearsay statement:

The forfeiture by wrongdoing doctrine, as adopted by us, only bars a defendant's objections under the confrontation clause of the federal Constitution and does not bar statutory objections under the Evidence Code. Thus, even if it is established that a defendant has forfeited his or her right of confrontation, the contested evidence is still governed by the rules of evidence; a trial court should still determine whether an unavailable witness's prior hearsay statement falls within a recognized hearsay exception and whether the probative value of the proffered evidence outweighs its prejudicial effect. (Evid. Code, § 352.)¹⁴⁹

147. *Id.* at 853.

148. *Id.* at 854.

149. *Id.*

Justice Werdegar's Concurrence

Justice Werdegar, joined by Justice Moreno, concurred in the California Supreme Court's decision in *Giles*. She agreed with the majority that "the doctrine of forfeiture by wrongdoing is not confined exclusively to witness-tampering cases, in which a defendant commits malfeasance in order to procure the unavailability of a witness," but can also be applied "where defendant's actions in procuring a witness's unavailability were the same actions for which he stood trial."¹⁵⁰ She criticized the Court, however, for addressing and resolving two subsidiary questions that were unnecessary to disposition of the case before it.¹⁵¹

In particular, Justice Werdegar noted:

- The Court "decides whether the prosecution, in order to use the victim's hearsay statements, must demonstrate the defendant's wrongdoing by clear and convincing evidence or only a preponderance of the evidence, despite its implicit acknowledgment the issue is not implicated here because either standard was satisfied."¹⁵²
- The Court "decides whether and to what extent the victim's challenged statements may be used in making this threshold showing of wrongdoing, despite the fact, again, the evidence independent of [the victim's] statements makes it unnecessary to speak to this point."¹⁵³

She explained that it was "unnecessary and unwise" to decide these issues because they were not addressed by either of the lower courts, they were not included in the grant of review

150. *Id.* at 855 (Werdegar, J., concurring).

151. *Id.*

152. *Id.*

153. *Id.*

and thus not fully briefed, and they required constitutional analysis, which “should not be embarked on lightly and never when a case’s resolution does not demand it.”¹⁵⁴

Review by the United States Supreme Court

After losing the case, the defendant in *Giles* petitioned the United States Supreme Court, urging it to review the California Supreme Court’s decision. Specifically, the defendant asked the Court to consider the following issue:

Does a criminal defendant “forfeit” his or her Sixth Amendment Confrontation Clause claims upon a mere showing that the defendant has caused the unavailability of a witness, as some courts have held, or must there also be an additional showing that the defendant’s actions were undertaken for the purpose of preventing the witness from testifying, as other courts have held?

In petitioning the Court to take the case, the defendant pointed out that lower courts are sharply divided on this issue.¹⁵⁵ The petition also emphasized the magnitude of the issue:

154. *Id.* at 856, 857.

155. See Petition for *Certiorari* in *Giles*, p. 10; see also *United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005) (“There is no requirement that a defendant who prevents a witness from testifying against him through his own wrongdoing only forfeits the right to confront the witness where, in procuring the witness’s unavailability, he intended to prevent the witness from testifying.”); *Giles*, 40 Cal. 4th at 849 (“Although courts have traditionally applied the forfeiture rule to witness tampering cases, forfeiture principles can and should logically and equitably be extended to other types of cases in which an intent-to-silence element is missing.”); *People v. Moreno*, 160 P.3d 242, 247 (Colo. 2007) (“Because the People failed to prove that the defendant had any intent to prevent or dissuade the child from witnessing against him, the record fails to demonstrate that he forfeited his constitutional right to confront her.”); *People v. Stechly*, 225 Ill. 2d 246, 277, 870 N.E.2d 333, 312 Ill. Dec. 268 (Ill. 2007) (plurality) (“[W]e hold that the State must prove that the defendant

A forfeiture rule that is triggered by mere causality emasculates the right to confrontation guaranteed in *Crawford*, because this exception will swallow the rule and it creates a perverse incentive for prosecutors to introduce hearsay rather than provide an opportunity for cross-examination.

The expanded forfeiture rule has wide application because it makes forfeiture of confrontation rights

intended by his actions to procure the witness' absence to invoke the doctrine of forfeiture by wrongdoing."); *State v. Meeks*, 277 Kan. 609, 614-16, 88 P.3d 789 (Kan. 2004) (without discussing whether defendant intended to prevent testimony, court finds defendant forfeited his right of confrontation by murdering victim), *overruled on other grounds*, *State v. Davis*, 283 Kan. 569, 158 P.3d 317 (Kan. 2006); *Commonwealth v. Edwards*, 444 Mass. 526, 540, 830 N.E.2d 158 (Mass. 2005) ("We hold that a defendant forfeits, by virtue of wrongdoing, the right to object to the admission of an unavailable witness's out-of-court statements on both confrontation and hearsay grounds on findings that (1) the witness is unavailable; (2) the defendant was involved in, or responsible for, procuring the unavailability of the witness; and (3) the defendant acted with the intent to procure the witness's unavailability."); *State v. Fields*, 679 N.W.2d 341, 347 (Minn. 2004) (upholding district court's forfeiture ruling because "the district court's findings that Fields engaged in wrongful conduct, that he intended to procure the unavailability of Johnson and that the intentional wrongful conduct actually did procure the unavailability of Johnson, were not clearly erroneous."); *State v. Romero*, 141 N.M. 403, 156 P.3d 694, 703, *cert. dismissed*, ___ S.Ct. ___, 2008 WL 114456 (Jan. 11, 2008) (No. 07-37) ("[W]e reaffirm our holding in *Alvarez-Lopez* that the prosecution is required to prove intent to procure the witness's unavailability in order to bar a defendant's right to confront that witness."); *State v. Mason*, 160 Wash. 2d 910, 926, 162 P.2d 396 (2007) ("Specific intent to prevent testimony is unnecessary. Knowledge that the foreseeable consequences of one's actions include a witness' unavailability at trial is adequate to conclude a forfeiture of confrontation rights."); *State v. Mechling*, 219 W.Va. 366, 326, 633 S.E.2d 311 (W.Va. 2006) ("In order for forfeiture to be proven in domestic violence actions, prosecutors, law enforcement officers and courts must secure evidence — possibly from third parties — prior to trial, indicating that these victims are too frightened to testify about the intimidating and coercive character of the accused's actions."); *State v. Jensen*, 299 Wis. 2d 267, 272, 727 N.W.2d 518, 2007 WI 26 (Wisc. 2007) ("Today, we explicitly adopt this doctrine whereby a defendant is deemed to have lost the right to object on confrontation grounds to the admissibility of out-of-court statements of a declarant whose unavailability the defendant has caused.").

virtually automatic in every homicide case. For the first time, an entire class of defendants has been stripped of the right to confrontation.

The expanded forfeiture rule also applies to cases where the witness could testify but does not. Prosecutors have argued that the defendant forfeits the right to confrontation whenever the witness's absence is due to the trauma of the criminal act. Domestic violence and sexual abuse cases can present the situation. Thus, once there is plausible evidence that the defendant is responsible for the traumatizing crime, the victim's testimonial hearsay would be admitted. This is so even though a witness may have independent, personal, and sometimes self-serving reasons for not appearing, such as concerns about privacy, possible self-incrimination, prior inconsistent statements, or the desirability of preserving pre-existing relationships.¹⁵⁶

Another petition simultaneously raised the same issue, but from the perspective of the prosecution, which had lost on the issue in the New Mexico Supreme Court.¹⁵⁷ That petition also emphasized the magnitude of the issue, but described the situation quite differently from the *Giles* petition:

In 1943, Justice Jackson expressed a ... fundamental public policy that ... counsels in favor of adopting a constitutional forfeiture rule without regard to the defendant's subjective intent or motive:

The influence of lawless force directed toward parties or witnesses to proceedings during their pendency is so sinister and undermining of the process of adjudication itself that no court should regard it with

156. Petition for *Certiorari* in *Giles*, pp. 15-16 (citations omitted).

157. The New Mexico case was *State v. Romero*, 141 N.M. 403, 156 P.3d 694, *cert. dismissed*, ___ S.Ct. ___, 2008 WL 114456 (Jan. 11, 2008) (No. 07-37).

indifference or shelter it from exposure and inquiry. The remedies of the law are substitutes for violence, not supplements to violence[.]

The New Mexico Supreme Court's opinion in this case holds that in some circumstances the federal Constitution requires our judicial system not only to tolerate but to reward its own undermining.

[B]y rewarding the intimidation and even murder of witnesses, the New Mexico Supreme Court's decision can only have the unintended effect of encouraging those practices. It is difficult to conceive of any result more sadly perverse than that.¹⁵⁸

In January 2008, the Court granted the petition in *Giles* and set a briefing schedule.¹⁵⁹ Oral argument will be heard in April and the Court is expected to issue its decision by the end of June.

Modification of Existing Law on Forfeiture by Wrongdoing as an Exception to the Hearsay Rule

Due to *Crawford* and the restrictions it has placed on introduction of a testimonial statement, there has been debate over whether to change California's approach to forfeiture by wrongdoing.¹⁶⁰ The concern is that California's hearsay rule exception for forfeiture by wrongdoing appears to be narrower than the constitutional exception for forfeiture by

158. Petition for *Certiorari* in *Romero*, p. 14 (citation omitted).

159. The Petition for *Certiorari* in *Romero* was dismissed on motion of the petitioner. See *supra* note 157.

160. See, e.g., AB 268 (Calderon) (2007-2008); SB 657 (Runner & Harman) (2007-2008); Revised Safe Neighborhood Act (No. 07-0094) (submitted 12/5/07 & amended 12/17/07); Crime Victims Protection Act: Stop Gang and Street Crime (No. 07-0089) (submitted 11/29/07 & withdrawn 12/21/07); Safe Neighborhood Act (No. 07-0076) (submitted 10/22/07 & amended 11/6/07).

wrongdoing, and thus a testimonial statement that would be admissible under the constitutional exception might still be excluded under the hearsay rule in California.

In August 2007, the Senate Committee on Judiciary asked the Law Revision Commission to study forfeiture by wrongdoing, particularly whether California should adopt a hearsay rule exception that tracks the constitutional minimum as articulated by the California Supreme Court in *Giles*.¹⁶¹ The Commission has since followed its usual procedure in conducting the requested study: holding a series of public meetings, preparing a tentative recommendation, posting the tentative recommendation to the Commission's website and broadly circulating it for comment, considering the comments on the tentative recommendation, and then drafting a final recommendation for printing and submission to the Legislature. Due to the deadline of March 1, 2008, the Commission had to accelerate this process, completing each step more quickly than usual.

From the outset, the Commission was concerned about the lack of guidance from the United States Supreme Court on key issues relating to forfeiture of the constitutional right of confrontation, particularly on the divisive issue of whether it is necessary to prove that the defendant intended to prevent testimony.¹⁶² The Commission's study thus explored four different possibilities:

- (1) Repeal California's existing provision on forfeiture by wrongdoing and replace it with a provision that tracks the constitutional minimum as articulated by the California Supreme Court.

161. See Letter from Ellen Corbett, *supra* note 1.

162. See Minutes of Oct. 26, 2008, Commission Meeting, p. 5; Second Supplement to Commission Staff Memorandum 2007-41 (Oct. 23, 2007), Attachment pp. 23-26, 36.

- (2) Replace the existing provision with one similar to the federal rule.
- (3) Broaden the existing provision to some extent.
- (4) Leave the law alone.

While the Commission was exploring these possibilities, the United States Supreme Court agreed to consider the issue raised in *Giles*. In light of that development, the Commission recommends that the Legislature take no action on forfeiture by wrongdoing until after the Court issues its decision. It would be unwise to proceed without the Court's soon-to-be-provided guidance on the constitutional constraints.

After the Court decides *Giles*, much more information will be available than at present, both on the permissible constitutional parameters and on the relevant policy considerations. The Legislature will have the benefit not only of the Court's opinion, but also any concurring or dissenting opinions, the briefs filed by the parties and any amici, and the wealth of scholarly writings that are likely to be generated as the case is pending and upon issuance of the Court's decision. The Legislature should wait for that information before assessing how to proceed.¹⁶³ This is not only the Commission's recommendation, but also the advice of many of the participants in the Commission's study.¹⁶⁴

163. Ideally, the Legislature would also have guidance from the California Supreme Court on the requirements of California's Confrontation Clause (Cal. Const. art. I, § 15). Cases interpreting that provision are rare, however, so it would be unrealistic to wait for such guidance.

164. See Commission Staff Memorandum 2007-54, Exhibit p. 1 (comments of California Public Defenders Ass'n & Los Angeles Public Defender's Office); Commission Staff Memorandum 2007-41 (Oct. 23, 2007), Exhibit p. 1 (comments of Prof. Capra); Second Supplement to Commission Staff Memorandum 2007-41 (Oct. 23, 2007), Exhibit p. 4 (comments of Prof. Friedman); Third Supplement to Commission Staff Memorandum 2007-41 (Oct. 23, 2007), Exhibit p. 1 (comments of Prof. Flanagan). At the Commission meeting on January 17, 2008, the California District Attorneys Association and

Once the Court decides *Giles*, the Legislature should fully consider the merits of the various approaches to forfeiture by wrongdoing as an exception to the hearsay rule, and then determine which approach would best serve the citizens of California. To assist the Legislature in this endeavor, the remainder of this report provides information about the approaches considered by the Commission, and gives some general suggestions regarding how the Legislature should proceed.

Approaches Considered by the Commission

Each approach considered by the Commission is described and discussed below. At this time, the Commission makes no recommendation on which approach would be the best long-term solution. The approaches are discussed in the order in which they were initially presented for Commission consideration.¹⁶⁵ The Commission has not ranked them in any manner.

Option #1. Replace Evidence Code Section 1350 with a Provision that Tracks the Constitutional Minimum as Articulated by the California Supreme Court.

The hearsay rule exception provided by Evidence Code Section 1350 is much narrower than the forfeiture exception to the federal Confrontation Clause as described by the

the Los Angeles City Attorney's Office also took the position that the Legislature should wait until *Giles* is decided before enacting any legislation on forfeiture by wrongdoing.

For contrary views, see Commission Staff Memorandum 2008-2 (Jan. 15, 2008), Exhibit p. 3 (comments of Paul Vinegrad) (urging immediate enactment of legislation tracking constitutional minimum as articulated by the California Supreme Court in *Giles*); Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit p. 12 (comments of Prof. Uelmen) (urging enactment of legislation similar to the federal exception for forfeiture by wrongdoing, without waiting until constitutional litigation is resolved).

165. See Commission Staff Memorandum 2007-41 (Oct. 10, 2007), pp. 29-45.

California Supreme Court in *Giles*. If the California Supreme Court's constitutional analysis is correct, admission of a hearsay statement might be constitutionally acceptable, yet the statement might still be subject to exclusion under the hearsay rule because it fails to satisfy the more stringent admissibility requirements of Section 1350.

To prevent a person from benefiting from wrongfully causing a witness' unavailability, the Legislature could repeal Section 1350 and replace it with a provision that tracks the constitutional minimum as articulated by the California Supreme Court in *Giles*. Specifically, a new provision could create an exception to the hearsay rule with the following features:

- The exception would apply when a party offers evidence of a statement made by a declarant who is unavailable to testify.
- The evidence must be offered against a party whose intentional criminal act caused the declarant to be unavailable to testify. It would not be necessary to show that the party intended to prevent the declarant from testifying.
- Such misconduct must be proved to the court by a preponderance of the evidence.
- The court would be permitted to consider the declarant's statement in determining whether the party against whom it is offered engaged in an intentional criminal act that caused the declarant to be unavailable to testify.
- The declarant's statement could not be the sole basis for finding that the party against whom it is offered engaged in an intentional criminal act that caused the declarant to be unavailable to testify. There must be some independent corroborating evidence.
- The intentional criminal act that caused the declarant's unavailability could be the same act

charged in the underlying case or it could be a different act.

- In a jury trial, the admissibility of the evidence must be determined outside the presence of the jury. The jury shall not be informed of the court's finding.¹⁶⁶

Many comments indicated that such an approach would be premature absent guidance from the United States Supreme Court on the constitutional minimum, especially on whether

166. The tentative recommendation indicated that a provision attempting to codify *Giles* could perhaps be drafted along the following lines:

Evid. Code § 1350 (added). Forfeiture by wrongdoing

1350. (a) Evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if both of the following are true:

(1) The declarant is unavailable as a witness.

(2) The evidence is offered against a party whose intentional criminal act caused the declarant to be unavailable to testify.

(b) The requirements of subdivision (a) shall be proved to the court by a preponderance of the evidence.

(c) The court may consider the evidence of the declarant's statement in determining whether the party against whom it is offered engaged in an intentional criminal act that caused the declarant to be unavailable as a witness. That evidence shall not be the sole basis for a finding that the party against whom it is offered engaged in an intentional criminal act that caused the declarant to be unavailable as a witness. There shall also be some independent corroborating evidence.

(d) The intentional criminal act that caused the declarant's unavailability may be the same as an act charged against the opponent of the evidence, or it may be a different act.

(e) If evidence is offered under this section in a jury trial, the court shall determine the admissibility of the evidence outside the presence of the jury. The jury shall not be informed of the court's finding.

Comment. Section 1350 supersedes former Section 1350 (1985 Cal. Stat. ch. 783, § 1). The new provision tracks the requirements of the forfeiture by wrongdoing exception to the federal Confrontation Clause (U.S. Const. amend. VI), as described by the California Supreme Court in *People v. Giles*, 40 Cal. 4th 833, 837, 152 P.3d 433, 55 Cal. Rptr. 3d 133 (2007), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Aug. 20, 2007) (No. 07-6053).

See Section 240 ("unavailable as a witness").

Tentative Recommendation on *Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing* (Oct. 2007), p. 23, n.145.

such an exception could constitutionally be invoked against a criminal defendant without proof that the defendant intended to prevent the declarant from testifying.¹⁶⁷ Comments on the merits of this approach were mixed.

Prosecutors who commented strongly favor the approach.¹⁶⁸ They pointed out that witnesses are often eliminated, intimidated, or otherwise deterred or prevented from testifying, particularly in gang cases, homicides, and domestic violence cases.¹⁶⁹ This impedes prosecutions.¹⁷⁰ If a defendant engages in an intentional criminal act that causes a witness to be unavailable, the defendant may benefit from that conduct by escaping conviction.¹⁷¹ The prosecutors maintained that such misconduct can and should be deterred by allowing out-of-court statements by the unavailable witness to be introduced against the defendant.¹⁷² They believe that proving the defendant's misconduct caused the witness' unavailability should be a sufficient basis for admissibility, without the additional burden of having to prove the defendant intended to silence the witness, which they consider overly difficult to

167. See *supra* note 163.

168. See Commission Staff Memorandum 2008-2 (Jan. 15, 2008), Exhibit p. 3 (comments of prosecutor Paul Vinegrad); Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit pp. 6-11 (comments of California District Attorneys Ass'n & Los Angeles City Attorney's Office).

169. See Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit pp. 7-8 (comments of California District Attorneys Ass'n & Los Angeles City Attorney's Office).

170. *Id.*

171. See Commission Staff Memorandum 2008-2 (Jan. 15, 2008), Exhibit p. 3 (comments of prosecutor Paul Vinegrad).

172. Commission Staff Memorandum 2008-2 (Jan. 15, 2008), Exhibit p. 3 (comments of prosecutor Paul Vinegrad); Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit p. 7 (comments of California District Attorneys Ass'n & Los Angeles City Attorney's Office).

meet.¹⁷³ In their view, adopting this approach will help to save witness' lives and ensure that criminals are brought to justice.¹⁷⁴

In law reviews and other legal commentary, a number of scholars have taken a similar position.¹⁷⁵ Two of these scholars, Prof. Richard Friedman and Prof. Deborah Tuerkheimer, submitted comments to that effect.¹⁷⁶

Public defenders strongly oppose the concept of enacting a hearsay exception that tracks the constitutional minimum as articulated by the California Supreme Court in *Giles*.¹⁷⁷ They point out that people do not always tell the truth and hearsay evidence, as compared to live testimony, is intrinsically

173. Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit pp. 8-9.

174. *Id.* at Exhibit p.8.

175. See, e.g., Raeder, *Confrontation Clause Analysis After Davis*, 22 Crim. Just. 10, 19 (Spring 2007) (forfeiture rationale is appropriate “despite the lack of any intentional witness tampering”); Tuerkheimer, *supra* note 67, at 49 (favorably discussing Prof. Lininger’s analysis); Lininger, *Reconceptualizing Confrontation After Davis*, 85 Tex. L. Rev. 271, 303 (2006) (“The best legislative strategy would be to devise a hearsay exception that covers both intentional procurement of unavailability and other wrongful conduct that incidentally, but foreseeably, results in the unavailability of the declarant.”); Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 Crim. Just. 4, 12 (Summer 2004) (dismissing concerns about eliminating requirement of intent to prevent testimony); *Percival*, *supra* note 69, at 253 (“The standard of forfeiture by wrongdoing should not require a showing of the defendant’s intent to prevent a witness from testifying.”).

176. Commission Staff Memorandum 2008-7 (Feb. 11, 2008), Exhibit pp. 1-8 (comments of Prof. Tuerkheimer) (favorably discussing Prof. Lininger’s proposed hearsay exception covering both intentional procurement of unavailability and other wrongful conduct that incidentally, but foreseeably, results in declarant’s unavailability); Second Supplement to Commission Staff Memorandum 2007-41 (Oct. 23, 2007), Exhibit p. 4 (comments of Prof. Friedman) (California Supreme Court “got it right” in *Giles*).

177. Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit pp. 1-2.

inferior proof.¹⁷⁸ They say that adopting the *Giles* approach would thus lead to the introduction of unreliable evidence, which defendants would be unable to effectively challenge through cross-examination.¹⁷⁹ They warn that this will impede the truth-finding process and cause innocent people to be wrongfully convicted and punished.¹⁸⁰ In their view, the admissibility of hearsay evidence should not be liberalized without demonstrating an unequivocal need for reform, supported by empirical evidence, which has not been provided in this context.¹⁸¹

Some scholars have likewise criticized the notion of a broad hearsay exception for forfeiture by wrongdoing, which does not require proof that the defendant intended to prevent the declarant from testifying.¹⁸² In the Commission's study, Prof. Miguel Méndez favorably discussed the intent-to-silence limitation and suggested that even if the United States Supreme Court does not impose such a limitation as a matter of constitutional law, the California Legislature should consider doing so.¹⁸³ Prof. Gerald Uelmen warned that if California adopts a hearsay exception based on the California

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. See, e.g., Flanagan, *supra* note 68, at 1248-49 (“[I]ntent, or implied intent, provides the essential connection between the defendant’s act and the loss of the confrontation rights that supports and justifies the loss of confrontation. Intent satisfies our view of constitutional rights as personal rights, and how they may be relinquished by personal decision”); Comparet-Cassani, Crawford *and the Forfeiture by Wrongdoing Exception*, 42 San Diego L. Rev. 1185, 1209 (2005) (“To extend the doctrine to cases where there is no evidence that the accused intended to prevent the witness from testifying at trial is to apply the doctrine where there is no equitable basis for its invocation.”).

183. First Supplement to Commission Staff Memorandum 2007-41 (Oct. 23, 2007), Exhibit pp. 15-16.

Supreme Court's approach in *Giles*, that would undermine the presumption of innocence in a murder case.¹⁸⁴ He explained that under the *Giles* approach, virtually every statement by a homicide victim would be admissible, because the defendant is accused of unlawfully rendering the victim unavailable, and *Giles* would only require the prosecution to support that accusation by a preponderance of the evidence at a foundational hearing.¹⁸⁵ Similarly, Prof. Daniel Capra reported that a group of federal judges expressed concern that the practical effect of eliminating the intent requirement would be to convict the defendant by a preponderance of the evidence.¹⁸⁶

In the same vein, Prof. Jeffrey Fisher cautioned that eliminating the intent-to-silence requirement might essentially mean that there is no right to cross-examine the victim in a domestic violence or child abuse case.¹⁸⁷ His concern is that courts will conclude the very nature of domestic violence or child abuse makes the victim afraid to testify and thereby triggers forfeiture.¹⁸⁸ Prof. James Flanagan shares this concern about exemption of categories of cases from the right of cross-examination.¹⁸⁹

Prosecutor organizations commented that this concern is misplaced.¹⁹⁰ Among other things, they pointed out that a

184. Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit p. 13.

185. *Id.*

186. First Supplement to Commission Staff Memorandum 2007-41 (Oct. 23, 2007), Exhibit p. 3.

187. *Id.*

188. Third Supplement to Commission Staff Memorandum 2007-41, Exhibit p. 2.

189. *Id.*

190. Commission Staff Memorandum 2008-2 (Jan. 15, 2008), Exhibit pp. 1-2 (comments of California District Attorneys Ass'n & Los Angeles City Attorney's Office). For additional analysis of the hypotheticals discussed in this

judge may exclude a victim's statement on grounds other than the hearsay rule, such as by exercising discretion to exclude evidence that is more prejudicial than probative.¹⁹¹ They also noted that this discretionary power can serve as a safeguard against introduction of unreliable evidence.¹⁹²

Because there is strong disagreement about codifying the California Supreme Court's approach in *Giles*, the Legislature will need to carefully weigh the relevant considerations if the United States Supreme Court decides that approach is constitutional. If the Legislature decides to go forward with the approach, it should consider a number of additional issues, including:

- Whether the hearsay exception for forfeiture by wrongdoing should include a requirement that the proffered statement was made under circumstances that indicate its trustworthiness.¹⁹³

comment, see Commission Staff Memorandum 2008-2 (Jan. 15, 2008), pp. 4-6; First Supplement to Commission Staff Memorandum 2008-2 (Feb. 1, 2008), Exhibit pp. 5-6 (comments of Prof. Méndez).

191. Commission Staff Memorandum 2008-2 (Jan. 15, 2008), Exhibit p. 2 (comments of California District Attorneys Ass'n & Los Angeles City Attorney's Office).

192. *Id.* at Exhibit p. 2; see Evid. Code § 352.

193. Prof. Méndez raised this issue. See Third Supplement to Commission Staff Memorandum 2007-41 (Oct. 26, 2007), Exhibit p. 5; First Supplement to Commission Staff Memorandum 2007-41 (Oct. 16, 2007), Exhibit p. 14. He noted that the admissibility requirements of *Giles* would not screen out evidence that lacks circumstantial guarantees of trustworthiness. Third Supplement to Commission Staff Memorandum 2007-41 (Oct. 26, 2007), Exhibit p. 5. He suggested that if California adopts a hearsay exception based on *Giles*, the exception should include a requirement that the proffered statement was made under circumstances that indicate its trustworthiness. *Id.* For an example of such a requirement, see Evid. Code § 1350(a)(4).

Prof. Capra criticized this idea. See Second Supplement to Memorandum 2007-41 (Oct. 23, 2007), Exhibit p. 3. The California District Attorneys Association and Los Angeles City Attorney's Office also opposed the idea at a Commission meeting.

- Whether it would be good policy to differentiate between a dead declarant and a live one, requiring proof of intent-to-silence if the declarant is alive but not if the declarant is dead.¹⁹⁴
- Whether to permit a judge to consider the proffered statement in determining whether the exception applies, which would be a deviation from California's longstanding rule that a judge can only consider admissible evidence in resolving a foundational fact dispute.¹⁹⁵

194. Prof. Fisher first brought this point to the Commission's attention. See First Supplement to Commission Staff Memorandum 2007-41 (Oct. 16, 2007), Exhibit p. 22. Some courts have mentioned the possibility of drawing such a distinction, without endorsing or rejecting that approach. See, e.g., *People v. Moreno*, 160 P.3d 242, 245-46 (Colo. 2007); *People v. Stechly*, 225 Ill. 2d 246, 870 N.E.2d 333, 352-53, 312 Ill. Dec. 268 (Ill. 2007) (plurality). The rationale for such a distinction would be that a dead declarant is certain to be unavailable to testify, while such certainty does not exist with respect to a live declarant.

If the Legislature decides to draw a distinction like this, it should do so in the hearsay exception for forfeiture by wrongdoing, not in the provision on unavailability (Evid. Code § 240). Unavailability, even unavailability due to a refusal to testify, can occur in a case that has nothing to do with forfeiture by wrongdoing (e.g., a brother refusing to testify against his sister out of feelings of loyalty). The proposed provision on unavailability due to a refusal to testify needs to function properly in this context, not just in the forfeiture context. Including an intent-to-silence requirement in it, rather than in the forfeiture provision, would be problematic.

195. Prof. Méndez raised this issue. See First Supplement to Commission Staff Memorandum 2007-41 (Oct. 16, 2007), Exhibit pp. 16-18.

In the federal courts, a judge is not bound by the rules of evidence in determining a preliminary question of admissibility. See Fed. R. Evid. 104(a); see also *Bourjaily v. United States*, 483 U.S. 171 (1987).

In contrast to the Federal Rules of Evidence, the Evidence Code does not permit a court to consider inadmissible evidence in determining a preliminary question of admissibility. See Fed. R. Evid. 104(a) advisory committee's note (California does not allow judge to consider inadmissible evidence in determining admissibility); Méndez Treatise, *supra* note 11, at 598-99 (same); J. Friedenthal, *Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code 6-7* (1976) (on file with the Commission) (same). Compare Tentative Recommendation and a Study relating to *The Uniform Rules of Evidence: Article 1. General Provisions*, 6 Cal. L. Revision Comm'n Reports

- Whether to draw any distinction between a civil case and a criminal case in drafting the exception.¹⁹⁶
- Whether to clarify the concept of causation, such as by specifying that the declarant's unavailability must be a foreseeable result of the wrongful act, that the wrongful act need not be the sole cause of the declarant's unavailability, or that the wrongful act must be a "but for" cause of the declarant's unavailability.¹⁹⁷
- Whether the exception should apply when a party acquiesces in an intentional criminal act that causes a declarant's unavailability, or only when a party engages in an intentional criminal act that causes a declarant's unavailability.¹⁹⁸
- Whether to impose a duty to mitigate, such that an out-of-court statement is inadmissible if the party

1, 19-21 (1964) (proposing provision that would generally permit judge to consider inadmissible evidence in determining preliminary fact that affects admissibility) with Evidence Code Section 402 (mirroring proposed provision in some respects, but omitting language that would generally permit judge to consider inadmissible evidence in determining preliminary fact that affects admissibility).

If the Legislature decides to deviate from this longstanding, code-wide approach and allow a judge to consider a declarant's statement in determining whether the statement is admissible due to forfeiture, a further issue is whether to allow a judge to base a forfeiture finding solely on the proffered statement. The United States Supreme Court's decision in *Giles* might address the constitutionality of such an action.

196. Maryland has two separate forfeiture exceptions: one for a civil case and the other for a criminal case. See *supra* notes 122-24.

197. Prof. Fisher alerted the Commission to the causation issue. See First Supplement to Commission Staff Memorandum 2007-41 (Oct. 23, 2007), Exhibit p. 23. For an interesting discussion of causation in the context of forfeiture, see Tuerkheimer, *supra* note 66, at 53-54 (arguing that dynamics of battering warrant expanded conception of causation of witness' unavailability).

198. This issue has been raised primarily in the context of whether to adopt the federal approach to forfeiture by wrongdoing. See *infra* note 216. However, it also arises in the context of whether to codify the California Supreme Court's approach in *Giles*.

proffering the statement failed to take reasonable steps to afford the adverse party an opportunity for cross-examination.¹⁹⁹

- Whether the exception should expressly say whether a pretrial showing of abuse, by itself, is sufficient to trigger forfeiture.²⁰⁰
- Whether particular language needs to be included in the exception to ensure that other objections to a statement, such as the declarant's lack of personal knowledge or inclusion of multiple hearsay, are permitted.²⁰¹

Option #2. Replace Evidence Code Section 1350 With a Provision Similar to Federal Rule of Evidence 804(b)(6)

A second possibility would be to repeal Evidence Code Section 1350 and replace it with a provision similar to

199. Prof. Friedman proposed the duty to mitigate in his Confrontation Blog. See <http://confrontationright.blogspot.com/2007/12/duty-to-mitigate-with-respect-to.html>. He says that *People v. Quitiquit*, 155 Cal. App. 4th 1, 65 Cal. Rptr. 3d 674 (2007), is an example of a case in which there was a failure to mitigate.

In that case, the victim made accusations against the defendant long before she died, and the state charged the defendant with assault before her death, yet the state did not give the defendant an opportunity to cross-examine the victim on her accusations. See *id.*

The trial court admitted the accusations under Evidence Code Section 1370, which creates a hearsay exception for a statement describing infliction or threat of physical injury. The court of appeal reversed, because the accusations were not made "at or near" the time of injury and were not made under circumstances indicating their trustworthiness. *Id.* at 9-12. Under a hearsay exception codifying the California Supreme Court's approach in *Giles*, the accusations probably would have been admissible (absent a duty to mitigate). See Commission Staff Memorandum 2008-2 (Jan. 15, 2008), Exhibit p. 3 (comments of Paul Vinegrad).

200. Prof. Fisher raised this issue. See First Supplement to Commission Staff Memorandum 2007-41 (Oct. 23, 2007), Exhibit p. 23.

201. Prof. Méndez raised this drafting issue. See First Supplement to Commission Staff Memorandum 2008-2 (Feb. 1, 2008), Exhibit pp. 5-6.

Federal Rule of Evidence 804(b)(6).²⁰² That could be done as follows:

Evid. Code § 1350 (added). Forfeiture by wrongdoing

1350. Evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if both of the following are true:

(a) The declarant is unavailable as a witness.

(b) The evidence is offered against a party who has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Comment. Section 1350 supersedes former Section 1350 (1985 Cal. Stat. ch. 783, § 1). The new provision is drawn from Federal Rule of Evidence 804(b)(6) and Uniform Rule of Evidence 804(b)(5).

See Section 240 (“unavailable as a witness”).

Because the federal rule provides a much broader forfeiture exception to the hearsay rule than the existing California provision, this approach would allow introduction of hearsay evidence that might otherwise be excluded. It would therefore help to address concerns that prosecution of some criminal cases has been impeded by *Crawford's* limitations on admissibility of testimonial statements.

Like the comments on the preceding approach, the comments on this approach were sharply divided.

Several scholars expressed support for the approach. Prof. Capra said California should adopt the federal approach to forfeiture by wrongdoing because consistency at the federal and state levels would be desirable.²⁰³ Prof. Méndez also made favorable comments about the federal approach,

202. See proposed Evid. Code § 1350 (Option #2) *infra*.

203. See Commission Staff Memorandum 2007-41 (Oct. 10, 2007), p. 37.

particularly its intent-to-silence limitation, although he did not directly endorse that approach.²⁰⁴

Prof. Uelmen commented that California should adopt the federal approach for two reasons.²⁰⁵ First, he said the federal approach would be preferable to the *Giles* approach because it would better serve the values underlying the hearsay rule: the preference for testimony given under oath, subject to cross-examination, and in a setting that permits the factfinder to observe the witness' demeanor.²⁰⁶ Second, he mentioned the importance of consistency and warned that forum shopping may occur if California's forfeiture by wrongdoing exception is broader than the federal one.²⁰⁷

Both prosecutor and public defender groups criticized the federal approach. The prosecutors said the approach is inadequate to address the problem of witness intimidation, because it requires proof of intent-to-silence and such proof is almost impossible to provide.²⁰⁸ Their understanding is that the federal exception is used infrequently for exactly that reason.²⁰⁹

For example, they noted that in a battering situation, it may be difficult to differentiate between a beating that is motivated by intent to intimidate the victim from testifying, and a beating that is motivated by other factors.²¹⁰ They said

204. First Supplement to Commission Staff Memorandum 2007-41 (Oct. 16, 2007), Exhibit pp. 14-16.

205. Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit pp. 14-15.

206. *Id.*

207. *Id.* at Exhibit p. 15.

208. Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit p. 8 (comments of California District Attorneys Ass'n & Los Angeles City Attorney's Office).

209. *Id.*

210. *Id.* at Exhibit p. 9; see also Tuerkheimer, *supra* note 66, at 53-54.

that in either situation, the likely result is that the victim is afraid to testify, fails to appear at trial, and the batterer profits from wrongful conduct. They therefore believe the forfeiture exception should apply regardless of the motivation for the wrongful conduct.²¹¹

Public defender groups gave different reasons for opposing the federal approach. Writing before the United States Supreme Court agreed to hear *Giles*, they stressed that there is much uncertainty regarding various forfeiture issues, so adoption of the federal approach may not actually result in consistency between the state and federal systems.²¹² They also warned that adopting the federal approach would result in admission of unreliable evidence that would be excluded under the current provision.²¹³ They further maintained that the approach exclusively benefits the prosecutor and thus unconstitutionally fails to provide procedural reciprocity to a criminal defendant.²¹⁴

If the Legislature weighs the competing considerations and decides to pursue the federal approach to forfeiture by wrongdoing, it would then be appropriate to consider many of the same points mentioned above with respect to codifying the California Supreme Court's approach in *Giles*.²¹⁵ In

211. Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit p. 9 (comments of California District Attorneys Ass'n & Los Angeles City Attorney's Office).

212. *Id.* at Exhibit p. 2 (comments of California Public Defenders Ass'n & Los Angeles Public Defenders Office).

213. *Id.* at Exhibit pp. 1-2.

214. *Id.* at Exhibit p. 3. Their point is that if a police officer engaged in wrongdoing that caused the unavailability of a declarant, the federal forfeiture exception would not apply because a police officer is not considered a party to a prosecution. In raising this issue, they cite *Wardius v. Oregon*, 412 U.S. 470 (1973), which involved the right to reciprocal discovery, not a forfeiture situation.

215. See *supra* notes 193-201 & accompanying text.

particular, concerns have been raised regarding application of the federal exception to a party who acquiesces, rather than engages, in wrongdoing that was intended to and did cause a declarant to be unavailable.²¹⁶ In considering this and other points, the Legislature should bear in mind that deviating from the text of the federal rule will reduce the benefits of consistency.

Option #3. Broaden Evidence Code Section 1350 to Some Extent

A third possibility would be to broaden Evidence Code Section 1350 to some extent. This could be done in a variety of different ways, because the statute includes many features.

In particular, if the Legislature is interested in exploring this approach, the features to consider and some possible revisions are:

- **Type of Case in Which the Exception Applies.** Section 1350 applies only in a criminal case charging a serious felony.²¹⁷ To discourage witness tampering in all types of cases, the provision could be modified to apply in any case, civil or criminal.

216. Prof. Flanagan did not take a position on the general concept of adopting the federal approach. But he pointed out that the term “acquiesce” is problematic because it includes not only a person who agrees to and encourages wrongdoing, but also a person who merely accepts the wrongdoing without agreeing to it. Third Supplement to Commission Staff Memorandum 1007-41 (Oct. 10, 2007), Exhibit p. 1; see also 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). Prof. Méndez also voiced concern about the term “acquiesce,” but he has not elaborated. See Commission Staff Memorandum 2007-54 (Dec. 11, 2007), p. 15. Several states have not included the term “acquiesce” in their forfeiture exceptions. See *supra* notes 111-16, 118, 119, 122-23 & accompanying text. However, the California District Attorneys Association and Los Angeles City Attorney’s Office see no problem with use of the term “acquiesce” and consider its inclusion necessary to successfully address the problem of witness intimidation. See *id.* at Exhibit p. 11.

217. Evid. Code § 1350(a).

- **Party Against Whom the Exception May Be Invoked.** Section 1350 can only be invoked against a criminal defendant.²¹⁸ The provision would be more even-handed if it was modified to apply to any party.
- **Reason for the Declarant's Unavailability.** Section 1350 applies only when the declarant's unavailability "is the result of the death by homicide or the kidnapping of the declarant."²¹⁹ The Legislature could perhaps remove that limitation.
- **Acquiescence in Wrongdoing that Results in the Declarant's Unavailability.** Section 1350 applies only when "the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered"²²⁰ In contrast, under the federal rule it is sufficient if a party has "acquiesced" in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.²²¹ It would be possible to extend Section 1350 to acquiescence in wrongdoing, like the federal rule.²²²
- **Standard of Proof.** Section 1350 requires proof by clear and convincing evidence.²²³ If the United States Supreme Court says a lower standard of proof would be constitutionally acceptable (such as preponderance of the evidence), the Legislature could consider whether it would be good policy to incorporate that standard in the statute.
- **Evidence that the Proponent of the Hearsay Statement Is Responsible for the Declarant's Unavailability.** Section 1350 cannot be invoked if

218. Evid. Code § 1350(a)(1).

219. *Id.*

220. *Id.*

221. See Fed. R. Evid. 804(b)(6).

222. But see *supra* note 216 & accompanying text.

223. Evid. Code § 1350(a)(1).

there is “evidence that the unavailability of the declarant was caused by, aided by, solicited by, or procured on behalf of, the party who is offering the statement.”²²⁴ This safeguard against unreliable evidence might be worth retaining.

- **Form of the Hearsay Statement.** Section 1350 applies only if the hearsay statement “has been memorialized in a tape recording made by a law enforcement official, or in a written statement prepared by a law enforcement official and signed by the declarant and notarized in the presence of the law enforcement official, prior to the death or kidnapping of the declarant.”²²⁵ This is a strong safeguard against fabricated evidence. It so severely limits application of the statute, however, that the provision may be of little use. The Legislature could consider removing the requirement altogether, or revising the statute to require that the hearsay statement be memorialized in a recording or in a writing made at or near the time of the statement.
- **Circumstances Under Which the Hearsay Statement Was Made.** Section 1350 can be invoked only if the hearsay statement “was made under circumstances which indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion.”²²⁶ The Legislature could examine the effect of these requirements and determine whether they are worth retaining.
- **Relevance of the Hearsay Statement.** Section 1350 expressly requires that the hearsay statement be relevant to the issues being tried.²²⁷ That language is unnecessary due to the general prohibition on

224. Evid. Code § 1350(a)(2).

225. Evid. Code § 1350(a)(3).

226. Evid. Code § 1350(a)(4).

227. Evid. Code § 1350(a)(5).

introducing irrelevant evidence.²²⁸ The language should be deleted.²²⁹

- **Evidence Connecting the Defendant to Commission of the Serious Felony Charged.** Under Section 1350, the proffered statement cannot be the sole evidence that connects the defendant to the serious felony charged against the defendant. Rather, the statement is admissible only if it “is corroborated by other evidence which tends to connect the party against whom the statement is offered with the commission of the serious felony with which the party is charged.”²³⁰ Evidence that merely shows the commission or circumstances of the offense is not sufficient corroboration.²³¹

This corroboration requirement focuses on connecting the defendant to the crime charged. It is different from requiring corroboration of the wrongdoing that results in forfeiture of a defendant’s right of confrontation. It appears to be intended to promote reliability in determinations of whether the defendant, as opposed to someone else, committed the crime charged. The Legislature could consider whether to continue such protection, and, if so, whether to extend it to any criminal case, not just a case charging a serious felony.

- **Notice of Intent to Invoke the Forfeiture by Wrongdoing Exception.** Section 1350 requires the prosecution to notify the defendant ten days before the prosecution offers a hearsay statement under the provision.²³² There is a good cause exception, but if good cause is shown the defendant is entitled to a

228. See Evid. Code § 350.

229. See *supra* notes 93-95 & accompanying text.

230. Evid. Code § 1350(a)(6).

231. *Id.*

232. Evid. Code § 1350(b).

reasonable continuance.²³³ This procedural requirement makes sense and probably should be retained, but the language would require modification if the statute were extended to all parties in all types of cases.

- **Procedure for Determining Whether the Exception Applies.** Section 1350 expressly states that if a hearsay statement is offered under it during trial, “the court’s determination shall be made out of the presence of the jury.”²³⁴ The provision also gives guidance on what procedure to use if a defendant elects to testify in connection with that determination.²³⁵ This guidance is useful and probably should be retained.
- **Multiple Hearsay.** Section 1350 expressly states that if the proffered statement “includes hearsay statements made by anyone other than the declarant who is unavailable ..., those hearsay statements are inadmissible unless they meet the requirements of an exception to the hearsay rule.”²³⁶ That language might be unnecessary due to the general provision governing multiple hearsay.²³⁷

Revisions such as those discussed above could be combined in a single amendment.²³⁸

The concept of retaining Section 1350 but broadening it in some respects drew no clear support. In part, this might have been because the Commission’s tentative recommendation

233. *Id.*

234. Evid. Code § 1350(c).

235. *Id.*

236. Evid. Code § 1350(e).

237. Evid. Code § 1201. But see First Supplement to Commission Staff Memorandum 2008-2 (Feb. 1, 2008), Exhibit pp. 5-6 (comments of Prof. Méndez).

238. See Appendix *infra*.

indicated that the reform could perhaps be a temporary measure, pending further guidance from the United States Supreme Court on the constitutional requirements.

Prof. Uelmen opposed the approach on the ground that it could lead to extended statutory tinkering.²³⁹ He considers forfeiture an area of the law where trial courts need certainty and clear guidance.²⁴⁰

Public defender groups opposed the approach on the ground that it would invite admission of unreliable evidence and thus lead to conviction of innocent people.²⁴¹ In contrast, prosecutor groups opposed the approach on the ground that it would not effectively address the problem of witness intimidation.²⁴²

Prof. Flanagan did not take a position on whether Section 1350 should be revised. He commented, however, that Section 1350 is a carefully drafted and limited forfeiture exception.²⁴³ He urged the Legislature to be cautious about making any revisions, so as to avoid creating a situation in which hearsay evidence is used in lieu of live testimony that could have been obtained.²⁴⁴ He also said that if the Legislature revises the statute, it should seriously consider leaving certain of its requirements intact, to safeguard against introduction of unreliable evidence.²⁴⁵

239. Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit p. 16.

240. *Id.*

241. *Id.* at Exhibit pp. 1, 3 (comments of California Public Defenders Ass'n & Los Angeles Public Defender's Office).

242. *Id.* at Exhibit p. 8 (comments of California District Attorneys Ass'n & Los Angeles Public Defender's Office).

243. Third Supplement to Commission Staff Memorandum 2007-41 (Oct. 26, 2007), Exhibit p. 2.

244. *Id.*

245. See *id.* (Legislature should give serious consideration to retaining subdivisions (a)(2)-(4) if Section 1350 is revised).

Although the concept of revising, rather than replacing or retaining, Section 1350 did not receive any support during the Commission's study, that could change depending on what the United States Supreme Court decides in *Giles*. The Legislature should evaluate the merits of the approach after the Court issues its decision.

Option #4. Leave Evidence Code Section 1350 Alone

A fourth option would be to leave Evidence Code Section 1350 alone and take no action on forfeiture by wrongdoing as an exception to the hearsay rule. This approach would leave intact a narrow, infrequently used hearsay exception designed to screen out unreliable evidence.

Public defender groups commented that this would be the best option for California.²⁴⁶ They believe it would best protect a defendant's constitutional right to a fair trial and the truth-seeking process of the criminal justice system.²⁴⁷ Although they submitted these comments before the United States Supreme Court agreed to hear *Giles*, and they stressed the uncertainty regarding the constitutional constraints for forfeiture,²⁴⁸ it seems probable that they will take the same position after the Court decides *Giles*.

Prof. Flanagan praised Section 1350 as carefully drafted,²⁴⁹ and other scholars have expressed similar views in legal

246. Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit p. 3 (comments of California Public Defenders Ass'n & Los Angeles Public Defender's Office).

247. *Id.*

248. *Id.* at Exhibit pp. 2-3.

249. Third Supplement to Commission Staff Memorandum 2007-41 (Oct. 26, 2007), Exhibit p. 2.

commentary.²⁵⁰ However, neither Prof. Flanagan nor any other scholar who commented in the Commission's study expressed a clear preference for leaving Section 1350 alone.

Prosecutor groups opposed the idea for the same reason that they opposed the concept of amending Section 1350. They view the statute as completely ineffective in deterring witness intimidation.²⁵¹

Prof. Uelmen also opposed the idea of leaving Section 1350 alone, but for a different reason. He considers the intent-to-silence requirement important and believes it is most likely to be preserved in the long-term if California adopts the federal approach to forfeiture by wrongdoing.²⁵²

Again, comments on the approach under consideration were strongly divided. In determining how to address forfeiture by wrongdoing as an exception to the hearsay rule, the Legislature is not likely to be able to achieve consensus. It should focus on making its own assessment of the best policy for the state.

Selection of the Best Approach

After the United States Supreme Court decides *Giles*, the Legislature will need to examine the constitutional minimum and determine whether to codify that minimum or deviate from it by providing additional statutory protection in one or more respects. Its decision on this matter will have major implications for the criminal justice system in California, and will also affect the civil justice system. The Legislature

250. E. Scallen & G. Weissenberger, *California Evidence: Courtroom Manual* 1209 (Anderson Publishing Co. 1st ed. 2000) (Section 1350 is "far more sensible than the vague and wide-ranging federal provision.").

251. Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit p. 8 (comments of California District Attorneys Ass'n & Los Angeles City Attorney's Office).

252. *Id.* at Exhibit pp. 13-16.

should therefore proceed with care, engaging in thorough deliberations and providing ample opportunity for input.²⁵³ If additional analysis from the Commission would be useful in this process, the Legislature could refer the matter (or aspects of it) back to the Commission for further study after the United States Supreme Court decides *Giles*. If the Legislature ultimately decides to enact new legislation on forfeiture by wrongdoing, that legislation should include a transitional provision, so as to prevent unnecessary litigation over retroactivity of the reform.²⁵⁴

In evaluating the possible statutory approaches, the Legislature should bear in mind two overriding and competing policy interests. On the one hand, if a person commits a wrongful act that causes a witness to be unavailable to testify, such behavior interferes with the operation of the justice system and may enable the person to evade justice. Under such circumstances, it may be appropriate to deprive the person of the opportunity to object to an out-of-court statement by the unavailable witness, so as

253. Due to the Truth-in-Evidence provision of the Victims' Bill of Rights (Cal. Const. art. I, § 28(d)), caution is especially warranted with respect to a reform that would increase the admissibility of relevant evidence in a criminal case. If such a reform is enacted and later proves unwise, it could only be undone by a vote of the people or a statute "enacted by a two-thirds vote of the membership in each house of the Legislature." *Id.*

254. For example, a transitional provision could be drafted as follows:

(a) This act shall become operative on January 1, 2010.

(b) This act applies in an action or proceeding commenced before, on, or after January 1, 2010.

(c) Nothing in this act invalidates an evidentiary determination made before January 1, 2010, that evidence is inadmissible pursuant to Section 1200 of the Evidence Code. However, if an action or proceeding is pending on January 1, 2010, the proponent of evidence excluded pursuant to Section 1200 of the Evidence Code may, on or after January 1, 2010, and before entry of judgment in the action or proceeding, make a new request for admission of the evidence on the basis of this act.

to level the playing field that was distorted by the person's misconduct.

On the other hand, an innocent person should not be punished for a criminal act committed by another, nor should a person guilty of one crime (e.g., manslaughter) be found guilty of a more egregious crime (e.g., premeditated murder). Likewise, it is important to achieve a just result in a civil case, not only for the sake of the parties but also because an unfair outcome may undermine public confidence in the justice system.²⁵⁵

An out-of-court statement by a witness who is wrongfully prevented from testifying does not necessarily have any special assurance of reliability. Admission of such a statement, without an opportunity to cross-examine the declarant, may mislead the factfinder and lead to an incorrect decision. While it might be appropriate to admit such a statement under some circumstances, the circumstances should be crafted to minimize the likelihood of an incorrect result, as well as ensure that wrongful conduct actually occurred and was sufficiently serious to justify forfeiture of the right of cross-examination.

Above all, any legislation on forfeiture by wrongdoing must comply with constitutional constraints. Failure to do so would create a risk of overturned convictions and concomitant problems. The Constitution of the United States is "the supreme law of the land, and the judges in every state shall be bound thereby, any thing in the ... laws of any state to the contrary notwithstanding."²⁵⁶

255. "Confidence in the reliability of verdicts is necessarily undermined when a party is stripped of the right to cross examine material adverse witnesses." First Supplement to Commission Staff Memorandum 2007-41 (Oct. 16, 2007), Exhibit p. 16 (comments of Prof. Méndez).

256. U.S. Const. art. VI, § 2.

PROPOSED LEGISLATION

Evid. Code § 240 (amended). Unavailable witness

SEC. _____. Section 240 of the Evidence Code is amended to read:

240. (a) Except as otherwise provided in subdivision (b), “unavailable as a witness” means that the declarant is any of the following:

(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.

(2) Disqualified from testifying to the matter.

(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.

(4) Absent from the hearing and the court is unable to compel his or her attendance by its process.

(5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court’s process.

(6) *Present at the hearing but persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so.*

(b) A declarant is not unavailable as a witness if the ~~exemption, preclusion, disqualification, death, inability, or absence of the declarant~~ *circumstance described in subdivision (a)* was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying.

(c) Expert testimony which 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 may constitute a sufficient showing of unavailability. ~~The pursuant to paragraph (3) of subdivision (a). As used in this section, the term “expert” means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.~~

The introduction of evidence to establish the unavailability of a witness under this subdivision shall not be deemed procurement of unavailability, in absence of proof to the contrary.

(d) As used in this section, the term “expert” means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.

Comment. Paragraph (6) is added to Section 240(a) to codify case law recognizing that a witness who refuses to testify is unavailable. See *People v. Rojas*, 15 Cal. 3d 540, 547-52, 542 P.2d 229, 125 Cal. Rptr. 357 (1975); *People v. Francis*, 200 Cal. App. 3d 579, 245 Cal. Rptr. 923 (1988); *People v. Walker*, 145 Cal. App. 3d 886, 893-94, 193 Cal. Rptr. 812 (1983); *People v. Sul*, 122 Cal. App. 3d 355, 175 Cal. Rptr. 893 (1981). The language is drawn from Rule 804(a)(2) of the Federal Rules of Evidence. Before making a finding of unavailability, a court must take reasonable steps to induce the witness to testify, unless it is obvious that such steps would be unavailing. *Francis*, 200 Cal. App. 3d at 584, 587; *Walker*, 145 Cal. App. 3d at 894; *Sul*, 122 Cal. App. 3d at 365.

Subdivision (b) is amended to reflect the revisions of subdivision (a).

Subdivision (c) is amended to reflect the revisions of subdivision (a) and delete the second sentence, which is continued without substantive change in new subdivision (d).

APPENDIX

The Commission's tentative recommendation on *Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing* (Oct. 2007) solicited comment on several possible reforms. Among those reforms was an amendment of Evidence Code Section 1350, which is shown below for background purposes only. The Commission is not recommending any change to Section 1350 at this time.

Evid. Code § 1350 (amended). Forfeiture by wrongdoing

1350. (a) ~~In a criminal proceeding charging a serious felony, evidence~~ *Evidence* of a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness, and all of the following are true:

(1) There is clear and convincing evidence that the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing ~~the arrest or prosecution of testimony against the party and is the result of the death by homicide or the kidnapping of the declarant.~~

(2) There is no evidence that the unavailability of the declarant was caused by, aided by, solicited by, or procured on behalf of, the party who is offering the statement.

(3) The statement has been memorialized in a ~~tape recording made by a law enforcement official, or in a written statement prepared by a law enforcement official and signed by the declarant and notarized in the presence of the law enforcement official, prior to the death or kidnapping of the declarant~~ *or a writing, which was made at or near the time of the statement.*

(4) The statement was made under circumstances ~~which~~ *that* indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion.

~~(5) The statement is relevant to the issues to be tried.~~

~~(6) The statement (5) If the statement is offered against the defendant in a criminal case, it is corroborated by other evidence which that tends to connect the party against whom the statement is offered with the commission of the serious felony offense with which the party is charged. The~~

~~The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.~~

~~(b) If the prosecution a party intends to offer a statement pursuant to this section, the prosecution that party shall serve a written notice upon the defendant adverse party at least 10 days prior to the hearing or trial at which the prosecution party intends to offer the statement, unless the prosecution party shows good cause for the failure to provide that notice. In the event that good cause is shown, the defendant adverse party shall be entitled to a reasonable continuance of the hearing or trial.~~

~~(c) If the statement is offered during a jury trial, the court's determination shall be made out of the presence of the jury. If the a criminal defendant elects to testify at the hearing on a motion brought pursuant to this section, the court shall exclude from the examination every person except the clerk, the court reporter, the bailiff, the prosecutor, the investigating officer, the defendant and his or her counsel, an investigator for the defendant, and the officer having custody of the defendant. Notwithstanding any other provision of law, the defendant's testimony at the hearing shall not be admissible in any other proceeding except the hearing brought on the motion pursuant to this section. If a transcript is made of the defendant's testimony, it shall be sealed and transmitted to the clerk of the court in which the action is pending.~~

~~(d) As used in this section, "serious felony" means any of the felonies listed in subdivision (c) of Section 1192.7 of the~~

~~Penal Code or any violation of Section 11351, 11352, 11378, or 11379 of the Health and Safety Code.~~

~~(e) If a statement to be admitted pursuant to this section includes hearsay statements made by anyone other than the declarant who is unavailable pursuant to subdivision (a), those hearsay statements are inadmissible unless they meet the requirements of an exception to the hearsay rule.~~

Comment. Section 1350 is amended to broaden its application.

The introductory paragraph of subdivision (a) is amended to make the section applicable in any civil or criminal case, not just in a case charging a serious felony. The federal hearsay exception for forfeiture by wrongdoing is similar in this regard. See Fed. R. Evid. 804(b)(6).

Consistent with the extension of this section to civil cases, subdivision (a)(1) is amended to refer to prevention of testimony, as opposed to prevention of arrest or prosecution. Subdivision (a)(1) is also amended to remove the limitation that the declarant's unavailability be the result of death by homicide or kidnapping of the declarant. The federal hearsay exception for forfeiture by wrongdoing is similar in this respect; it includes no such limitation. See Fed. R. Evid. 804(b)(6).

Subdivision (a)(3) is amended to expand the types of statements that are admissible under this section. Timely memorialization is still required, but it is no longer necessary that the statement be given to a law enforcement official and taped or notarized. See Section 250 ("writing").

Subdivision (a)(4) is amended to make a stylistic revision.

Subdivision (a)(5) is deleted as surplusage. See Section 350 ("No evidence is admissible except relevant evidence.").

Subdivision (a)(6) (new subdivision (a)(5)) is amended to reflect that this section is no longer limited to a case charging a serious felony. The corroboration requirement of this subdivision, which focuses on connecting the defendant to the crime charged, now applies in any criminal case, but only if the evidence is proffered by the prosecution.

Subdivision (b) is amended to reflect that this section may now be invoked by any party, not just by the prosecution in a criminal case.

Subdivision (c) is amended to reflect that a case does not necessarily involve a jury. The subdivision is also amended to reflect that this section now applies to any civil or criminal case. The restrictions pertaining to testimony by a defendant were originally drafted for the criminal context; they are still limited to that context.

Subdivision (d), defining "serious felony," is deleted to reflect that this section now applies in any civil or criminal case, not just a case charging a serious felony.

Subdivision (e) is deleted as surplusage. See Evid. Code § 1201 (if evidence involves more than one hearsay statement, each hearsay statement must satisfy exception to hearsay rule).

See Section 240 (“unavailable as a witness”).
