Study K-600 October 16, 2007

First Supplement to Memorandum 2007-41

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

The Commission is fortunate to have received comments from two Stanford Law School professors regarding its study of forfeiture by wrongdoing as an exception to the hearsay rule. This supplement presents and discusses those comments, which are attached as follows:

Exhibit p.

- Prof. Miguel Méndez, Stanford Law School (10/12/07) 1
- Prof. Jeffrey Fisher, Stanford Law School (10/11/07) 22

COMMENTS OF PROF. MIGUEL MÉNDEZ

Prof. Miguel Méndez is the Commission's consultant for its study reviewing the Evidence Code and examining whether to make improvements based on the Federal Rules of Evidence and the Uniform Rules of Evidence. In connection with that study, he has prepared extensive background materials for the Commission, all of which have been or will be published in the *University of San Francisco Law Review*. He also recently published an article in *Stanford Law Review* on the implications of the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). See Méndez, Crawford v. Washington: *A Critique*, 57 Stan. L. Rev. 569 (2004).

Prof. Méndez has taken the time to prepare an extensive analysis for the Commission on forfeiture by wrongdoing. Exhibit pp. 1-21. His analysis provides a thorough discussion of the pertinent issues and case law in the context of California. It is a valuable complement to the analysis provided by the staff in Memorandum 2007-41; the two analyses are quite different yet generally consistent. We encourage Commission members and interested persons to read Prof. Méndez's analysis in full.

His analysis focuses on Assembly Bill 268 (Calderon), which is pending in the Legislature as a two-year bill. Pertinent portions of the most recent version of the bill are reproduced in the analysis.

In reading the analysis, interested persons should bear in mind that the views expressed by Prof. Méndez, like the views expressed in any report a consultant prepares for the Commission, are his own personal views and not necessarily those of the Commission. The Commission's longstanding practice is not to take a position on a pending bill prepared by another source, even if the bill deals with the same subject matter as a Commission study. Rather, the Commission "speaks to the Legislature through its own recommendations and bills." CLRC Memorandum 1999-85, p. 2. Further, the members and staff of the Commission might explain or revise a Commission proposal in the legislative process, but they never solicit votes for the proposed legislation.

In the attached analysis, Prof. Méndez states his opinion on a number of different points. He does not, however, make a specific suggestion about what, if anything, the Commission should propose in a tentative recommendation on forfeiture by wrongdoing. Members of the Commission might want to take the opportunity to ask him about this at the upcoming meeting, or to pose questions about other aspects of his analysis. The staff appreciates the effort he spent on his analysis and is pleased that he plans to attend the meeting.

COMMENTS OF PROF. JEFFREY FISHER

Prof. Jeffrey Fisher of Stanford Law School successfully represented the defendant in the two major Confrontation Clause cases that the United States Supreme Court recently decided: The *Crawford* case and *Davis v. Washington*, __ U.S. __, 126 S.Ct. 2266 (2006). He currently represents the defendant in *State v. Romero*, 141 N.M. 403, 156 P.3d 694, *petition for cert. filed,* __ U.S.L.W. __ (U.S. July 6, 2007) (No. 07-37), in which the prosecution has asked the United States Supreme Court to decide:

> When the defendant kills a witness who had previously made testimonial statements against him, does he forfeit his constitutional right to confront her only if he killed her with the specific intent to prevent her from testifying at trial?

The Court has not yet ruled on whether to grant certiorari and decide this question on the merits.

Prof. Fisher has read Memorandum 2007-41 and provided a number of thought-provoking comments. Exhibit pp. 22-24. In making these comments, he has tried to act "in the role of law professor, though [he has] been an active participant in confrontation clause litigation and [he represents] Mr. Romero in his pending case in the Supreme Court." *Id*. at 22.

Prof. Fisher begins by noting that the "biggest issue in the forfeiture world" is whether it is sufficient to show that a defendant caused a witness to become unavailable, or it is also necessary to show that the defendant acted with intent to silence the witness. *Id*. He makes several observations regarding that issue.

Possible Distinction Based on Whether the Declarant is Dead or Alive

First, Prof. Fisher points out that "the question whether intent is required isn't necessarily an all-or-nothing issue." *Id*. In fact, the Illinois Supreme Court recently decided that intent *is required* if the unavailable witness is alive, but it left open the possibility that the rule might be different if the unavailable witness is dead. *See People v. Stechly*, 225 Ill. 2d 246, 870 N.E.2d 333, 352-53, 312 Ill. Dec. 268 (Ill. 2007) (plurality opin.). Prof. Fisher agrees that "resolution of the intent question might differ depending on whether the declarant has been killed." Exhibit p. 22. He urges legislators to "keep this in mind both as a potential constitutional outcome of the current debate and as a possible statutory solution, especially as caselaw develops and the Supreme Court eventually grants cert in one kind of case or another." *Id.*

Implications of Eliminating the Intent Requirement in an Abuse Case

Prof. Fisher further notes that if serious thought is being given to "dispensing with an intent requirement across the board (that is, not just in cases involving the declarant's death)," it is important to "consider the implications of doing so." *Id*. at 23. In particular, Prof. Fisher explains:

> It's my understanding that many prosecutors believe and are starting to argue in court that if intent is not required, then courts should find not only that defendants on trial for homicide have forfeited their right to confrontation when sufficient proof in a pretrial hearing shows that they caused the victim's death, but also that courts should find that defendants on trial for domestic and child abuse have forfeited their right to confrontation when sufficient proof at a pretrial hearing shows that they committed those crimes. In other words, *prosecutors are beginning to take the position that the very nature of domestic or child abuse is that it makes the victim afraid or otherwise unwilling to testify and thereby triggers*

> *forfeiture. This is obviously a huge issue, for it essentially decides whether abuse prosecutions are exempt from the reach of the confrontation clause.*

Id. (emphasis added).

Prof. Fisher says that a conscientious legislator "should consider (i) whether he/she thinks that result is constitutional; (ii) whether that result is good policy; and (iii) whether any new statute expanding forfeiture beyond instances of specific intent should come right out and say whether a pretrial showing of abuse is sufficient to trigger forfeiture." *Id*. He warns that if "a no-intent-required law is enacted and (iii) is left unaddressed, the Legislature can expect that this statutory issue ... will be the subject of widespread and intense litigation, presumably involving numerous 'battles of the experts' and likely involving disparate and conflicting decisions depending on each judge's point of view." *Id*.

Ambiguities Relating to Causation of a Declarant's Unavailability

Prof. Fisher also points out that ambiguity "could result if statutory language were enacted that speaks in terms of the wrongful conduct that 'caused' the declarant to be unavailable." *Id*. An example of such statutory language is the draft provision shown on pages 30-31 of Memorandum 2007-41, which would codify *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).

Prof. Fisher notes that tort law "generally requires a 'cause' to be a 'but for' cause and to trigger a foreseeable result." Exhibit p. 23. He queries whether the proposed statutory language would incorporate these concepts, or "would it simply require the defendant's conduct to be 'a' cause of the declarant's unavailability, and/or extend to results that were unforeseeable (such as purchasing a plane ticket for someone and then the plane crashing or feeding them food but not knowing they have a rare allergy from which they die)?" *Id*. He observes that it "may be useful for any enactment to so specify."

Statistics on Refusal to Testify in a Domestic Violence Case

Finally, Prof. Fisher notes that Memorandum 2007-41 refers to studies indicating that about 80% of domestic violence victims recant or refuse to testify. *Id*. He says that "is a powerful statistic, and one that may reasonably push many legislators to think that strong medicine is necessary to address that problem." *Id*.

He thinks it is important to emphasize, however, "that the studies all were conducted before *Crawford* was announced." *Id.* He explains that the situation may now be quite different:

> In the pre-*Crawford* world, prosecutors had little or no legal incentive to bring such accusers into court, so many did not try very hard to do so. By contrast, in the few pre-*Crawford* jurisdictions that implemented policies and programs aimed at ensuring the victims of domestic violence come to court, ... *victims apparently cooperated in up to 95% of cases.*

Id. (emphasis added.)

Prof. Fisher says "it might be worthwhile to present this data so legislators realize there may be approaches besides enacting a broad forfeiture provision available to combat the problem of reluctant witnesses in domestic violence cases. *Id.* at 23-24. He has provided supporting materials, which the staff has not yet reviewed. We will examine those materials carefully when time permits.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

To: Barbara Gaal
From: Miguel A. Méndez
Date: October 12, 2007

Analysis of AB 268

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A. Introduction.

Occasionally, prosecutors find it indispensable as well as useful to offer the statements of declarants who for some reason are unable to testify at the trial. Since these statements are often offered for the truth of the matter stated, California's hearsay rule would bar their use in the absence of an exception. Fortunately for prosecutors, the Evidence Code contains a number of useful exceptions. Among them are the exceptions for excited utterances,[1] dying declarations,[2] statements regarding gang-related crimes,[3] statements relating the infliction or threat of physical injury,[4] statements by the elderly and dependent adults offered in prosecutions for the crime of elderly or

[1]West's Ann. California Evidence Code § 1240.

[2]West's Ann. California Evidence Code § 1242.

[3]West's Ann. California Evidence Code § 1231.

[4]West's Ann. California Evidence Code § 1370.

dependent adult abuse,[5] statements by children describing acts of child abuse,[6] and statements by declarants who are prevented from testifying in trials charging a serious felony.[7]

With the exception of excited utterances and dying declarations,[8] the remaining exceptions require prosecutors to prove the declarant's unavailability to testify at the trial. If the declarant is available to testify, no justification exists for depriving defendants of their right to cross examine the declarant under oath in the presence of the fact finder.

All of the exceptions contain other restrictions. Some limit the exception to certain kinds of prosecutions, for example, prosecutions charging a serious felony,[9] elderly or dependent adult abuse,[10] or gang activities.[11] Some require the statement to be memorialized in writing or recorded electronically.[12] Others require the prosecution to give the defendant notice of its intention to offer the statement.[13] Still others provide the judge with guidelines for determining the admissibility of the statement.[14] Some require the statement to be supported by corroborative evidence.[15] Others merely require the judge to consider the presence or absence of supporting evidence in determining the admissibility of the statement.[16] The exception for statements offered in cases charging a serious felony is specifically designed to make admissible statements by declarants who have been prevented from testifying.[17] None of the exceptions authorizes the judge to consider the hearsay declaration in determining whether the proponent has met the foundational requirements.

Subsection 1390(a) of AB 268 purports to enlarge the prosecutors' arsenal by creating a hearsay exception for a statement that "is offered against a party who has engaged or acquiesced in wrongdoing that has caused the unavailability of the declarant as a witness." The Federal Rules of

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[5]West's Ann. California Evidence Code § 1380.

[6]West's Ann. California Evidence Code § 1360.

[7]West's Ann. California Evidence Code § 1350.

[8]The declarant does not have to die. If the declarant unexpectedly survives, the dying declaration may still be offered in an attempted homicide prosecution as long as the foundational facts are satisfied.

[9]See West's Ann. California Evidence Code § 1350(a).

[10]See West's Ann. California Evidence Code § 1380(a).

[11]West's Ann. California Evidence Code § 1231(a).

[12]See, e.g., West's Ann. California Evidence Code §§ 1350(a)(3), 1370(a)(5), 1380(a)(3), and 1231(b).

[13]See, e.g., West's Ann. California Evidence Code §§ 1231.1, 1350(b), 1360(b), 1370(c), and 1380(b).

[14]See, e.g., West's Ann. California Evidence Code § 1231(f) and 1370(b).

[15]See, e.g., West's Ann. California Evidence Code § 1350(a)(6) and 1380(a)(5).

[16]See, e.g., West's Ann. California Evidence Code § 1231(f)(3) and 1370(b)(3).

[17]See West's Ann. California Evidence Code §§ 1350(a)(1).

Evidence contain a similar, though more limited, hearsay exception. Rule 804(b)(6) provides a hearsay exception for a "statement 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."[18] Unlike Section 1390(a), the Rule requires the proponent to prove the opposing party's intent to silence the declarant.

Whether or not the declarant is unavailable as a witness is currently determined by Evidence Code Section 240. A declarant is unavailable if he or she is (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, or (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.[19]

AB 268 adds a sixth ground of unavailability. A declarant is also unavailable as a witness if "the declarant refuses to testify, notwithstanding imposition of sanctions, and the statement is offered against the party that has engaged or acquiesced in wrongdoing that was intended to, and did procure the unavailability of the declarant as a witness." The Federal Rules of Evidence contain a similar but broader ground. Rule 804(a)(2) defines as unavailable a declarant who "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so."[20]

Each of the two provisions added by AB 268 will be discussed separately.[21] At the outset, however, it is important to underscore that Section 1390 is not limited to criminal cases or to prosecutors. By terms it applies both to criminal and civil cases, and is available to any of the parties to the proceeding. This analysis, however, focuses primarily on the use of Section 1390 by prosecutors because the author's principal concern, as disclosed in the Assembly Committee on Public Safety's analysis of May 3, 2007, is with the prosecutors' need of an additional hearsay exception.[22]

B. Cross-Examination, Confrontation, and the Hearsay Rule.

1. Cross-Examination and the Hearsay Rule.

A chief goal of the hearsay rule is to enhance the fact finding process by excluding certain

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[18]Federal Rule of Evidence 804(b)(6).

[19]West's Ann. California Evidence Code § 240.

[20]Federal Rule of Evidence 804(a)(2).

[21]AB 268 would also amend the Evidence Code by adding a hearsay exception for present sense impressions. This provision is not discussed in this analysis.

[22]See Assembly Committee on Public Safety Analysis dated May 3, 2007, beginning at page 4.

declarations whenever the declarants cannot be subjected to cross-examination.[23] The rule achieves this goal by permitting the opposing party to object to the use of out of court statements that are offered to prove the truth of the matter asserted. Since the use of hearsay deprives the opponent of an opportunity to challenge the credibility of the hearsay declarant whenever the declarant is not produced at the trial, the rule proceeds on the assumption that cross-examination is vital to assuring the reliability of evidence.

The nature of testimony supports this assumption. In evaluating the testimony of witnesses, the fact finder should take into account the witnesses' abilities to perceive the subject matter of their testimony and to recall and narrate those perceptions at the hearing.[24] Flaws in these abilities need to be exposed, a task that falls upon the party opposing the witness. That party is given a tool calculated to do just that—the right to cross examine the witness under oath in the presence of the fact finder. The hearsay rule gives substance to that right by allowing the opposing party to object whenever an out of court statement is offered for the truth of the matter stated. In the absence of exceptions, the rule would force the proponent of the statement to produce the testimonial sources for cross-examination under oath in the presence of the fact finder.[25]

2. Cross-Examination and Confrontation.

The Confrontation Clause of the Sixth Amendment entitles criminal defendants to confront the witnesses called to testify against them. Given the vital role of cross-examination in exposing the unreliability of evidence given on direct examination, the Confrontation Clause would appear to require the state to present its evidence through witnesses who testify subject to cross-examination. The United States Supreme Court, however, has never held that the Sixth Amendment always entitles criminal defendants to cross examine the witnesses called by the state. In *Crawford v. Washington*[26] the Court held that the Sixth Amendment requires only the exclusion of "testimonial" hearsay offered by the prosecution against the accused when the declarant is not produced for cross-examination.[27] The Court, however, created an exception to the exclusionary rule. Even if the declarant is not produced, no confrontation violation will occur if the accused was given an opportunity prior to the trial to cross-examine the declarant.[28]

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[23]Some exceptions apply even if the declarant is present in court and can be cross examined. For example, an excited utterance can be offered through the declarant as a witness.

[24]See Federal Rules of Evidence for United States Courts and Magistrates, Article VIII at 105–106 (Advisory Committee Note) (West 2002-2003 ed.).

[25]When a witness refuses to submit to cross-examination, the conventional remedy is for the trial judge to strike the testimony the witness gave on direct examination. Fost v. Superior Court, 80 Cal. App.4th 724, 735-736, 95 Cal. Rptr.2d 620, 627 (2000).

[26]541 U.S. 36 (2004).

[27]Id. at 59. The Court declined in *Crawford* to provide a comprehensive definition of "testimonial" hearsay.

[28]Id. at 68.

In *Davis v. Washington*[29] the Court described an additional circumstance when the state's failure to produce the hearsay declarant will not result in a confrontation violation:

> We reiterate what we said in *Crawford*: that "the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds." 541 U.S., at 62, 124 S.Ct. 1354 (citing *Reynolds*, 98 U.S., at 158-159). That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.[30]

In this circumstance, the trial judge must overrule the accused's confrontation objection and allow the fact finder to consider the hearsay statement if the statement is otherwise admissible for the truth of the matter stated under the tribunal's evidence rules. The Court, however, declined to specify (1) the burden of persuasion that the prosecution must meet in order to enable the trial judge to make a forfeiture finding or (2) the kind of evidence the judge may consider in making the finding.

> 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, see, e.g., *United States v. Scott*, 284 F.3d 758, 762 (C.A.7 2002). State courts tend to follow the same practice, see, e.g., *Commonwealth v. Edwards*, 444 Mass. 526, 542, 830 N.E.2d 158, 172 (2005). Moreover, if a hearing on forfeiture is required, *Edwards*, for instance, observed that "hearsay evidence, including the unavailable witness's out-of-court statements, may be considered." Id., at 545, 830 N.E.2d, at 174.[31]

In *People v. Giles*[32] the California Supreme Court specified (1) the elements of the forfeiture doctrine, (2) the burden of persuasion the prosecution must meet, and (3) the kind of evidence the judge can consider in making a forfeiture finding. Giles was convicted of murdering his former girlfriend. At the trial, the judge admitted a statement the victim had made to a police officer. The officer testified that the victim told him that Giles had said, "If I catch you fucking around I'll kill you."[33] The hearsay was admitted under California Evidence Code Section 1370, which establishes an exception for out of court statements relating a threat of physical injury upon the declarant if the judge, among other matters, finds that the declarant is unavailable to testify under Section 240 and

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[29]126 S.Ct. 2266 (2006).

[30]Id. at 2280.

[31]Id.

[32]40 Cal.4th 833, 152 P.3d 433, 55 Cal. Rptr.3d 133 (2007).

[33]Id. at 839, 152 P.3d at 437, 55 Cal.Rptr.3d at 136).

the statement is trustworthy.[34]

The California Supreme Court affirmed Giles' conviction. Even though the court conceded that the victim's statement was "testimonial" under the Sixth Amendment,[35] the court held that Giles had forfeited his right to object to its introduction on confrontation grounds.[36] In reaching its holding, the court laid down a number of guidelines to assist California judges in applying the Sixth Amendment's forfeiture doctrine.

First, a judge should not find that the accused has forfeited his or her right to object on Sixth Amendment grounds unless the prosecution persuades the judge by a preponderance of the evidence that "the witness [is] genuinely unavailable to testify and the unavailability for cross-examination [was] caused by the defendant's intentional criminal act."[37]

Second, in determining whether the prosecution has carried its persuasion burden, the judge may consider the hearsay declarant's statement. But the judge's forfeiture finding may not be based "solely on the unavailable witness's unconfronted testimony; there must be independent corroborative evidence that supports the forfeiture finding."[38]

Third, although relevant, the prosecution does not have to prove that the accused's purpose was to prevent the hearsay declarant from testifying. It is sufficient for the prosecution to prove that the accused's criminal act had the effect of preventing the hearsay declarant from testifying.[39] In this regard, it is immaterial that the act giving rise to the witness's unavailability at the trial is also the criminal act for which the accused is on trial.[40]

C. Proposed Section 1390.

Section 2 of AB 268 would add the following section to the Evidence Code:

1390. (a) Evidence of a statement is not made inadmissible by the hearsay rule if the statement is offered against a party who has engaged or acquiesced in wrongdoing that has caused the unavailability of the declarant as a witness.

(b) (1) The party seeking to introduce a statement pursuant to subdivision (a) shall establish, by a preponderance of the evidence, that the elements of subdivision (a) have been met at a foundational hearing.

(2) Hearsay evidence, including the hearsay evidence that is the subject of the

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[34]See West's Ann. California Evidence Code § 1370.

[35]People v. Giles, 40 Cal.4th 833, 840, 152 P.3d 433, 437, 55 Cal.Rptr.3d 133, 138 (2007).

[36]Id. at 854, 152 P.3d at 447, 55 Cal.Rptr.3d 133at 149.

[37]Id. at 853, 152 P.3d at 446, 55 Cal.Rptr.3d at 148.

[38]Id.

[39]Id. at 848-849, 152 P.3d at 442, 55 Cal.Rptr.3d at 144.

[40]Id. at 8551-852, 152 P.3d at 444, 55 Cal.Rptr.3d at 146.

foundational hearing, is admissible at the foundational hearing. However, a finding that the elements of subdivision (a) have not been met shall not be based solely on the unconfronted hearsay statement of the unavailable declarant, and shall be supported by independent corroborative evidence.

(3) The foundational hearing shall be conducted outside the presence of the jury. However, if the hearing is conducted after a jury trial has begun, the judge presiding at the hearing may consider evidence already presented to the jury in deciding whether the elements of subdivision (a) have been met.

(c) If a statement to be admitted pursuant to this section includes a hearsay statement made by anyone other than the declarant who is unavailable pursuant to subdivision (a), that other hearsay statement is inadmissable unless it meets the requirements of an exception to the hearsay rule.

Among the concerns that the Legislature should consider in crafting a new exception are (1) whether a new exception is necessary; (2) whether any new exception is appropriately circumscribed to preserve the accused's right to cross-examine adverse witnesses; and (3) whether California should deviate from its practice of prohibiting the use of inadmissible evidence as proof of the foundational elements of any exception.

1. Whether a New Hearsay Exception is Necessary.

a. Whether a New Hearsay Exception is Needed to Implement *Giles*.

The Assembly Committee on Public Safety's analysis quotes the author as stating:

> California prosecutors need to utilize the forfeiture by wrongdoing doctrine in order to admit hearsay statements of victim/witnesses whose failure to appear to testify at trial is the result of the criminal conduct of the defendant. Based on the holding of People v. Giles, decided on March 6, 2007, prosecutors must establish that evidence proffered to establish forfeiture by wrongdoing meets a statutory hearsay exception. Current law provides no viable hearsay exception to permit the introduction of this evidence. This bill provides this needed hearsay exception.[41]

The author is mistaken. Under *Giles*, the prosecution does not need a new hearsay exception to offer evidence to prove forfeiture. As a matter of Sixth Amendment jurisprudence, the prosecution is entitled to establish the elements by admissible as well as some inadmissible evidence. As has been noted, *Giles* allows the prosecution to offer and the judge to consider the hearsay statement in issue as proof of the forfeiture requirements, provided the prosecution also offers independent corroborative evidence that supports the forfeiture finding. *Giles* simply prohibits the judge from making a forfeiture finding solely on the basis of the declarant's hearsay statement.

Of course, the prosecution may not offer the hearsay declarant's statement to the jury for the

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[41] Assembly Committee on Public Safety Analysis dated May 3, 2007, at 4.

truth of the matter stated, unless California law provides an exception. In *Giles* the hearsay declarant's statement was admitted under Evidence Code Section 1370, which creates a hearsay exception for statements by unavailable declarants relating the infliction or threat of physical injury.[42]

Giles' relationship to the hearsay rule can be illustrated by the sequence in which a criminal defendant objects to hearsay offered by the prosecution. First, the defendant will object on hearsay grounds. If the judge finds that the evidence is hearsay, the prosecution will be given an opportunity to explain why it falls within an exception. Second, if the judge overrules the defendant's objection on the ground that the hearsay falls within an exception, the defendant can object on confrontation grounds. If the judge finds that the evidence constitutes inadmissible testimonial hearsay under *Crawford* and its progeny, the prosecution may seek to persuade the judge to overrule the defendant's confrontation objection by offering evidence that satisfies the *Giles* forfeiture test. Third, if the judge finds that the defendant has forfeited his confrontation objection, the judge may allow the jury to hear the hearsay declaration.[43] The judge may do so because the judge had previously ruled that a state exception applied.

b. Section 1390 as a Codification of *Giles*.

The Assembly Committee on Public Safety's analysis also quotes the author as saying that:

> California must enact a forfeiture by wrongdoing exception so that the doctrine can operate fairly and effectively. This bill is consistent with the Giles case to ensure that defendant's [sic] are not deprived of any applicable constitutional protections. At the same time, this bill provides guidance to judges, prosecutors and criminal defense attorneys by setting forth a concise description of the manner in which the doctrine is practically applied.[44]

This language suggests that the purpose of the Section 1390 is not just to create a new hearsay exception in order to implement *Giles* but also to codify *Giles*' forfeiture doctrine. In assessing the wisdom of codifying a constitutional doctrine, two considerations should be kept in mind.

First, in *Giles* the California Supreme Court was attempting to respond to questions that ultimately must be answered by the U.S. Supreme Court. It is up to the U.S. Supreme Court to prescribe the Sixth Amendment's elements of the forfeiture doctrine, the prosecution's burden of persuasion, and whether inadmissible evidence, including uncorroborated hearsay, may be offered by the prosecution in support of a forfeiture finding. Therefore, if Section 1390 is merely an attempt to codify *Giles*' forfeiture doctrine, the California Legislature has the option to refrain from enacting a forfeiture provision until the U.S. Supreme Court addresses the question. On August 20, 2007,

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[42]See West's Ann. California Evidence Code § 1370.

[43]The judge retains discretion to exclude hearsay falling within an exception if the judge concludes that its probative value on the contested issues is substantially outweighed by the countervailing considerations enumerated in Evidence Code Section 352.

[44]Assembly Committee on Public Safety Analysis dated May 3, 2007, at 6.

Giles petitioned the U.S. Supreme Court for certiorari.[45] The Court could use *Giles* to specify the precise elements of the Sixth Amendment forfeiture doctrine or the Court could wait until it grants a petition for certiorari in another case.[46] Until then, California prosecutors would still be free to invoke *Giles'* forfeiture doctrine in response to the accused's confrontation objection.

Second, the California Legislature retains its competency to regulate some aspects of the *Giles* forfeiture doctrine. The California Supreme Court in *Giles* was simply setting out a forfeiture doctrine which the court believes is mandated by the Sixth Amendment. State law—whether decisional, statutory, or constitutional—may impose more stringent standards for the admission of evidence offered by the prosecution and regulated by the Federal Constitution. At one time, for example, California required prosecutors to prove beyond a reasonable doubt that the accused had waived their *Miranda* rights.[47] That standard of persuasion changed with the advent of Proposition 8's Right to Truth-in-Evidence provision. Subject to enumerated exceptions, this provision gives parties to California criminal proceedings the state constitutional right not to have relevant evidence excluded.[48] Since a confession is legally relevant irrespective of whether it was taken in violation of *Miranda*, Proposition 8 overturned those state decisions requiring prosecutors to prove compliance with *Miranda* beyond a reasonable doubt.[49] Proposition 8, of course, cannot diminish federal constitutional rights. Today, the admissibility of evidence over a federal constitutional objection is determined by the standards the U.S. Supreme Court laid down in *Lego v. Twomey.*[50] In that case, the Court held that the accused is entitled to a "clear-cut" determination that his or her constitutional rights have been observed.[51] That demand can be met by requiring the prosecution to prove compliance with the constitutional standards at least by a preponderance of the evidence.[52]

Proposition 8 allows the Legislature to override the provisions of the Right to Truth-in-Evidence provision if the legislation is supported at least by two-thirds of the membership of each house.[53] Accordingly, if Section 1390 draws the required votes, the Legislature may (1) add elements

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[45]No. 07-6053.

[46]In State v. Romero, 156 P.3d 694 (N.M. Sup. Ct. 2007), the New Mexico Supreme Court reversed a defendant's conviction on the ground that the prosecution had failed to establish that the defendant had forfeited his Sixth Amendment right to object to hearsay offered under a state exception. On July 6, 2007 the state petitioned the U.S. Supreme Court for a writ of certiorari. See No. 07-37.

[47]See People v. Stroud, 273 Cal.App.2d 670, 678, 78 Cal.Rptr. 270, 275 (1969).

[48]West's Ann. California Constitution Article 1, § 28(d).

[49]See People v. Kelly, 51 Cal.3d 931, 972, n. 1, 800 P.2d 516, 542, n. 1, 275 Cal.Rptr. 160, 186, n. 1 (1990) (Mosk, J., concurring), *cert. denied*, 502 U.S. 842 (1991).

[50]404 U.S. 477 (1972).

[51]Id. at 489.

[52]Id.

[53]West' Ann. California Constitution Article 1, § 28(d).

to the *Giles* prima facie case, (2) impose a higher persuasion burden on prosecutors, and (3) prohibit the judge from considering inadmissible evidence in making the forfeiture finding.

A comparison of Section 1390 with the *Giles* forfeiture doctrine reveals both similarities and differences. The similarities relate to the persuasion burden the prosecution must meet and to the kind of evidence the prosecution may offer to establish forfeiture. The differences relate to the kind of wrongdoing that can give rise to forfeiture and to whether the judge may base a forfeiture finding solely on the hearsay declaration at issue.

(1) Subsection 1390(b)(1) provides that "the party seeking to introduce a statement pursuant to subdivision (a) shall establish, by a preponderance of the evidence, that the elements of subdivision (a) have been met at a foundational hearing." This is identical to the persuasion burden specified in *Giles*.[54]

(2) Subsection 1390(b)(2) provides that "[h]earsay evidence, including the hearsay evidence that is the subject of the foundational hearing, is admissible at the foundational hearing." Subdivision (c), however, provides that a "hearsay statement made by anyone other than the declarant who is unavailable pursuant to subdivision (a) * * * is inadmissible unless it meets the requirements of an exception to the hearsay rule." Combined, Subsections (b)(2) and (c) create a limited hearsay exception that allows the judge to consider the hearsay declaration at issue in determining whether the accused has forfeited his confrontation rights. This limited hearsay exception is identical to the one specified in the *Giles*.[55]

(3) Subsection 1390(a) provides that "[e]vidence of a statement is not made inadmissible by the hearsay rule if the statement is offered against a party who has engaged or acquiesced in wrongdoing that has caused the unavailability of the declarant as a witness." "Wrongdoing" under Subsection 1390(a) is not limited to criminal wrongs. The term can embrace civil wrongs as well. *Giles*, by contrast, requires the witness's unavailability to be "caused by the defendant's intentional criminal act."[56] Under Subsection 1390(a), negligent offenses, such as involuntary manslaughter, and strict liability offenses, such as felony murder, could be offered to establish the witness's unavailability, so long as other evidence shows that the commission of the crime "caused" the witness's unavailability. Presumably, offenses predicated on negligence or strict liability would not qualify as an "intentional criminal act" under *Giles*. Thus, if Section 1390 is designed to codify *Giles*, it goes too far in defining the wrongdoing giving rise to forfeiture.

(4) *Giles* holds that in determining whether the prosecution has carried its persuasion burden, the judge may consider the hearsay declarant's statement.[57] But the judge's forfeiture finding may not be based "solely on the unavailable witness's unconfronted testimony; there must be independent corroborative evidence that supports the forfeiture finding."[58] It is unclear whether Section 1390

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[54]People v. Giles, 40 Cal.4th 833, 854, 152 P.3d 433, 446, 55 Cal.Rptr.3d 133, 148 (2007).

[55]Id.

[56]Id.

[57]Id.

[58]Id.

allows the judge to consider the hearsay declaration at issue in making the forfeiture finding. On one hand, Subsection 1390(b)(2) provides that "[h]earsay evidence, including the hearsay evidence that is the subject of the foundational hearing, is admissible at the foundational hearing." On the other hand, Subsection 1390(b)(3) provides that "a finding that the elements of subdivision (a) have not been met shall not be based solely on the unconfronted hearsay statement of the unavailable declarant, and shall be supported by independent corroborative evidence." The ambiguity in this subsection could be eliminated if the first "not" is stricken. Then the two subsections in combination would only prohibit the judge from making a forfeiture finding solely on the hearsay declaration at issue. Such a construction would be in accord with *Giles*' requirements. The Senate Committee on Judiciary's analysis prepared in connection with the hearing scheduled for June 26, 2007, states that "a finding of 'wrongdoing' shall not be based solely on the un-confronted hearsay statement of the unavailable declarant and shall be supported by independent corroborative evidence."[59] If this indeed the intent of Section 1390, then the first "not" in Subsection 1390(b)(3) should be stricken.

Striking the first "not" would not, however, conform Section 1390's forfeiture doctrine with *Giles*' doctrine. The kind of "wrongdoing" contemplated by Section 1390 would still embrace criminal misconduct that would not qualify as an "intentional criminal act." Indeed, Section 1390 could count as "wrongdoing" misconduct that might be only civil in nature.

c. Section 1390 as an Independent Hearsay Exception.

The most persuasive evidence that Section 1390 is not intended solely as a codification of the *Giles* Sixth Amendment forfeiture doctrine is its application to civil cases. Section 1390's hearsay exception can be invoked by any party (not just prosecutors) and can be applied against any party (not just criminal defendants) who engage or acquiesce in the requisite wrongdoing. In contrast, the Sixth Amendment forfeiture doctrine is limited to criminal cases.

Section 1390 would provide prosecutors with a useful hearsay exception whenever the hearsay they seek to introduce is inadmissible under existing exceptions. For example, in a grand theft prosecution a witness's statement to the police about the identity of a thief would be inadmissible under Section 1350 because grand theft is not a "serious felony."[60] The declaration would also be inadmissible as a dying declaration because it does not relate to the cause or circumstances regarding the declarant's death.[61] Nor would the declaration be admissible under the exceptions for declarations against interest, excited utterances, or former testimony, or the other exceptions enumerated in the introduction. But if the prosecution can convince the judge that the declarant is unavailable under Section 240(a) and that his or her unavailability can be attributed to kind of wrongdoing specified in Section 1390(a), then the judge may admit the declaration.

Although parties to civil proceedings do not have to satisfy the *Giles* forfeiture doctrine to invoke Section 1390, the new hearsay exception would be equally useful to parties in civil

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[59]Senate Committee on Judiciary's Analysis prepared for the June 26, 2007 hearing, at 4-5.

[60]West's Ann. California Evidence Code § 1350(a). For a definition of offenses qualifying as serious felonies, see West's Ann. California Penal Code § 1192.7.

[61]West's Ann. California Evidence Code § 1242.

proceedings whenever existing hearsay exceptions are unavailable. The Evidence Code does not contain a forfeiture exception for use in civil cases, and none appears to have been crafted by the appellate courts. Other jurisdictions provide such an exception. Federal Rule of Evidence 804(b)(6) applies in civil cases as well as in criminal cases, and so does Uniform Rule of Evidence 804(b)(5), which is almost identical to the Federal Rule.[62]

2. Whether the New Exception Is Appropriately Circumscribed So as to Preserve the Accused's Right to Cross-examine the Prosecution's Witnesses.

AB 268 is not the first bill to address the need for a hearsay exception for damaging statements made by declarants who are prevented from testifying in a criminal case. Evidence Code Section 1350, which the Legislature added to the Code in 1985, allows the use of such statements in criminal proceedings.[63] Section 1390, however, is much broader than Section 1350 and lacks many of the protections of Section 1350.

Subsection 1350(a) is limited to criminal proceedings charging a serious felony.[64] Subsection 1390(a) applies to any prosecution, irrespective of the gravity of the crimes charged.

Subsection 1350(a)(1) limits unavailability to death by homicide or kidnaping of the declarant.[65] Subsection 1390(a) includes any "wrongdoing that has caused the unavailability of the declarant as a witness." Moreover, "wrongdoing" under Section 1390 is not limited to homicide and kidnaping but could include other criminal wrongdoing such as a threatened assault[66] as well as such civil wrongs as wrongful deaths that are predicated on civil, not criminal, negligence.

Subsection 1350(a)(1) requires proof 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 that party.[67] Section 1390 requires only proof that the declarant's unavailability was caused by wrongdoing engaged or acquiesced in by the defendant. Proof of intent to silence the declarant as a witness is not required.

Subsection 1350(a)(1) requires the proponent to prove the foundational facts by clear and convincing evidence and does not authorize the use of inadmissible hearsay as proof of the

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[62]Federal Rule 804(b)(6) speaks of "wrongdoing that was intended to, and did, *procure* the unavailability of the declarant" while the Uniform Rule of Evidence speaks of "wrongdoing that was intended and did *cause* the unavailability of the declarant". (Emphasis added). The framers of the Uniform Rule believe the Uniform Rule to be "in accord" with the Federal Rule. See Uniform Rule of Evidence 804(b)(5) (Comment).

"As of January 1, 2007, forty-two states and Puerto Rico had adopted the Federal Rules in various forms." J. WEINSTEIN, J. MANSFIELD, N. ABRAMS, M. BERGER, EVIDENCE— 2007 RULES, STATUTE AND CASE SUPPLEMENT, Preface at iii. It is unclear how many of the state adoptions include a version of Rule 804(b)(6).

[63]West's Ann. California Evidence Code § 1350 (Comment).

[64]West's Ann. California Evidence Code § 1350(a).

[65]West's Ann. California Evidence Code § 1350(a)(1).

[66]See West's Ann. California Penal Code § 422 (criminal threats).

[67]Id.

foundational facts.[68] Subsection 1390(b) imposes upon the proponent the burden of proving the foundational facts only by a preponderance of the evidence and appears to allow the use of the hearsay statement at issue as proof of those facts.[69]

Subsection 1350(a)(3) requires the statement offered in evidence to have "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."[70] Section 1390 has no such requirements.

Subsection 1350(a)(4) empowers the judge to exclude the declaration unless the judge finds that the declaration was made under circumstances that "indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion."[71] Section 1390 does not contain an equivalent provision.

Subsection 1350(b) requires the prosecution to serve a written notice advising the defendant of its intention to offer evidence under the section.[72] Section 1390 does not contain a notice provision.

In sum, Section 1350 evinces the Legislature's concern with preserving the accused's right of cross-examination even when the accused has been charged with bringing about the hearsay declarant's unavailability by death or kidnaping. In this regard, the Assembly Committee on Public Safety's analysis of AB 268 is in greater accord with Section 1350. The analysis rightly emphasizes that out of court statements are "intrinsically inferior proof" because they can preclude the opponent from exposing their unreliability by probing for flaws in the declarant's powers of perception, recollection, narration, and sincerity.[73]

Section 1350's emphasis on procedural safeguards also reflects a concern that hearsay admitted under the exception may be bereft of any circumstantial guarantees of trustworthiness. Many hearsay exceptions are justified on the ground that they possess such circumstantial guarantees of trustworthiness as to render cross-examination unnecessary. Declarations against interest are believed to be reliable because their admission requires proof that it was against the declarant's interest to make the declaration.[74] Dying declarations are believed to be reliable because of the

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[68]Id.

[69]As has been noted, it is unclear whether the language of Subsection 1390(b)(2)-(3) allows the judge to consider the hearsay declaration in making the forfeiture finding. See text accompanying note 57 supra.

[70]West's Ann. California Evidence Code § 1350(a)(3).

[71]West's Ann. California Evidence Code § 1350(a)(4).

[72]West's Ann. California Evidence Code § 1350(b).

[73]Assembly Committee on Public Safety's Analysis dated May 3, 2007, at 6.

[74]West's Ann. California Evidence Code § 1230.

improbability that persons who know they are about to die would do so with a lie on their lips.[75] Excited utterances are considered reliable because to qualify under the exception the proponent must establish that the declarant did not have time to fabricate the statement.[76] Contemporaneity also explains the justification for the hearsay exceptions for state of mind declarations[77] and, to a lesser degree, entries in business and official records.[78]

Where the declaration lacks these kinds of circumstantial guarantees of trustworthiness, some exceptions expressly empower the judge to exclude the declaration if the circumstances attending its making lead the judge to conclude that the declaration is untrustworthy.[79] Section 1350 expressly gives this power to the judge.[80] So do Sections 1360 (hearsay exception for statements made by minors describing acts of child abuse or neglect),[81] 1370 (hearsay exception for statements made by victims describing the infliction or threatened infliction of physical injury),[82] Section 1380 (hearsay exception for statements made by victims offered in prosecutions charging elder or dependent adult abuse),[83] and Section 1231 (hearsay exception for statements made by deceased declarants relating to acts or events relevant in a prosecution for gang related crimes).[84] Section 1390 does not contain an equivalent provision. Since hearsay declarations that would be admissible under Section 1390 do not need to possess any circumstantial guarantees of trustworthiness, consideration should be given to providing judges with discretion to exclude the declarations whenever judges conclude from the evidence that the declarations were not made under circumstances indicating their trustworthiness.

Other jurisdictions impose more stringent conditions on the admissibility of hearsay under their forfeiture doctrines than does Section 1390. In particular, the federal courts limit the forfeiture doctrine to those instances in which the defendant's wrongdoing was "was intended to, and did, procure the unavailability of the declarant as a witness."[85] Neither Subsection 1390(a) nor *Giles*

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[75]West's Ann. California Evidence Code § 1242.

[76]West's Ann. California Evidence Code § 1240.

[77]West's Ann. California Evidence Code § 1250.

[78]West's Ann. California Evidence Code §§ 1270-1280.

[79]Even though the contemporaneity of state of minds declarations furnish them with a degree of trustworthiness, doubts about their reliability led the California Legislature to include a provision giving the judge the power to exclude them whenever the judge finds that they were not made under circumstances indicating their trustworthiness. See West's Ann. California Evidence Code § 1252.

[80]See West's Ann. California Evidence Code § 150(a)(4).

[81]West's Ann. California Evidence Code § 1360(a)(2).

[82]West's Ann. California Evidence Code § 1370((a)(4).

[83]West's Ann. California Evidence Code § 1380(a)(1).

[84]West's Ann. California Evidence Code § 1231(f).

[85]See, e.g., Federal Rule of Evidence 804(b)(6) and Uniform Rule of Evidence 804(b)(5).

includes this limitation. *Giles* expressly rejects it and allows the forfeiture doctrine to embrace any "intentional criminal act" (including the crime for which the accused is on trial) that results in the witness's unavailability.

> 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."[86]

The intent-to-silence limitation is not novel. As the above quote indicates, courts have traditionally limited the forfeiture doctrine to circumstances where the defendant intended to silence the hearsay declarant.[87] They have done so for a good reason. To these courts, the question regarding the declarant's unavailability is not merely one of causation. To justify stripping defendants of their right to cross examine adverse witnesses, these courts also insist on a blameworthy state of mind. As drafted, Subsection 1390(a) would strip parties, including criminal defendants, of their right to confront adverse witnesses on a strict liability basis. So long as the requisite civil or criminal "wrongdoing" causes the declarant's unavailability, the causation element will be satisfied even if the objecting party had no idea that his or her "wrongdoing" could possibly result in the witness's unavailability.[88]

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[86]People v. Giles, 40 Cal.4th 833, 849, 152 P.3d 433, 443, 55 Cal.Rptr.3d 133, 144 (2007).

[87]Id.

[88]Hearsay would not admissible under Section 1390's forfeiture doctrine unless the proponent also establishes the declarant's unavailability to testify under Section 240. Subsection 240(a)(3) provides that a declarant is unavailable if the declarant is "unable to attend or testify at the hearing because of then existing physical or mental illness or infirmity." This provision has been construed to include declarants who refuse to testify because of fear for their safety or their families' safety. See People v. Rojas, 15 Cal.3d 540, 550-551, 125 Cal. Rptr. 357, 542 P.2d 229 (1975). However, mere inconvenience, including the anguish and physical discomfort that testifying can produce, is insufficient to render the declarant unavailable on the ground of "mental infirmity." See People v. Williams, 93 Cal. App.3d 40, 54, 155 Cal. Rptr. 414, 421 (1979). But a judge can rule the declarant unavailable as a result of physical or mental infirmity if expert testimony establishes that the physical or mental trauma suffered by the declarant during the commission of the crime charged has caused such harm that the declarant cannot testify or can do so only by suffering additional substantial trauma. Id. The *Williams* limitation is now codified in Subsection 240(c). The limitation will acquire new importance if Section 1390 is enacted as written. In addition to satisfying the causation element of Section 1390, a prosecutor seeking to establish the declarant's unavailability under Section 240(a)(3) would have to satisfy Subsection 240(c)'s limitation. Accordingly, Subsection 240(c) could serve as an important check on the use of Section 1390 to strip defendants of their right to cross examine adverse witnesses where the prosecution relies on the crime victim's fear of the defendant to establish Subsection 1390(a)'s causation element and Subsection 240(a)(3)'s unavailability requirement.

Although the U.S. Supreme Court declined in *Davis* to specify the requirements of the forfeiture doctrine, the Court did allude to the intent-to-silence limitation. In explaining the availability of the forfeiture doctrine, the Court noted that "the Sixth Amendment does not require courts to acquiesce" when criminal "defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims."[89] The Court may or may not impose the intent-to-silence limitation as part of its Sixth Amendment jurisprudence, but even if it does not, the California Legislature is free to impose it.

The Legislature should consider following the lead set by the lower federal courts. In incorporating the intent-to-silence limitation into Federal Rule of Evidence 804(b)(6), the Advisory Committee noted that the split among the federal circuits was over the persuasion burden that applies to the forfeiture prima facie case and not over the inclusion of the limitation:

> Every circuit that has resolved the question has recognized the principle of forfeiture by misconduct, although the tests for determining whether there is a forfeiture have varied. See, e.g., *United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir.1992); *United States v. Potamitis*, 739 F.2d 784, 789 (2d Cir.), *cert. denied*, 469 U.S. 918 (1984); *Steele v. Taylor*, 684 F.2d 1193, 1199 (6th Cir.1982), *cert. denied*, 460 U.S. 1053 (1983); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir.1979), *cert. denied*, 449 U.S. 840 (1980); *United States v. Carlson*, 547 F.2d 1346, 1358-59 (8th Cir.), *cert. denied*, 431 U.S. 914 (1977). The foregoing cases apply a preponderance of the evidence standard. Contra *United States v. Thevis*, 665 F.2d 616, 631 (5th Cir.) (clear and convincing standard), *cert. denied*, 459 U.S. 825 (1982). 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.[90]

The U.S. States Supreme Court has acknowledged that denying a party the right to cross examine adverse witnesses calls into question "the integrity of the fact finding process".[91] Confidence in the reliability of verdicts is necessarily undermined when a party is stripped of the right to cross examine material adverse witnesses. Accordingly, the Legislature should consider with the care the circumstances when a party's "wrongdoing" should result in the forfeiture of this important right.

3. Whether California Should Deviate from its Practice of Prohibiting the Use of Inadmissible Evidence as Proof of the Foundational Elements of Any Hearsay Exception.

Section 1390 applies to civil cases as well as to criminal cases. Its application to civil cases raises the question whether California should deviate from its practice of prohibiting the use of inadmissible evidence as proof of preliminary facts, including the foundational elements of hearsay

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[89]Davis v. Washington, 126 S.Ct. 2266, 2280 (2006).

[90]Federal Rule of Evidence 804(b)(6) (Advisory Committee Note).

[91]Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

exceptions. When the Legislature approved the California Evidence Code in 1965, it rejected a recommendation by the California Law Revision Commission permitting a judge to consider inadmissible evidence (other than privileged matter) in determining the existence of foundational facts. The Legislature declined to enact the recommendation and, instead, retained the California practice of requiring the use of admissible evidence to establish these facts.[92] This practice has generally served California well and avoided some problems experienced by the federal courts.

In contrast, Federal Rule of Evidence 104(a) allows federal judges to consider unprivileged, inadmissible evidence in determining the existence of foundational facts.[93] Rule 104(a) thus allows a federal judge to consider the hearsay declaration at issue as proof of the foundational facts of the exception for the declaration. But whether the declaration alone should suffice as proof of the foundational facts has proved controversial. The federal appellate courts that have considered this practice have found such gross bootstrapping unacceptable and required the proponent to offer some evidence in addition to the hearsay declaration as proof of the foundational facts.[94] In 1997, Rule 801(d)(2) was amended to reflect the concerns expressed by the federal circuit judges. The amended rule provides that "the contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and participation therein of the declarant and the party against whom the statement is offered under subdivision (E)."[95] These subdivisions refer to the hearsay exemptions for authorized admissions, admissions by agents and servants, and coconspirators' declarations.

Subsection 1390(a)(2) allows the judge to consider the hearsay statement that is the subject of the foundational hearing as proof of the foundational facts. Like the Federal Rule, the subsection appears to prohibit the judge from making a forfeiture determination solely on the evidence of the hearsay declaration. The judge's finding must be "supported by independent corroborative evidence."[96] Since in a civil case Section 1390 cannot be viewed as a codification of the *Giles* forfeiture doctrine, the subsection raises the important question of whether California should depart from its long-standing and unbroken practice of insisting on the use of admissible evidence in resolving foundational fact disputes. Perhaps, some circumstances might justify relaxing the

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[92]See M. MÉNDEZ, EVIDENCE: THE CALIFORNIA CODE AND THE FEDERAL RULES — A PROBLEM APPROACH § 17.06 (Thomson-West 3d ed. 2004).

[93]See Federal Rule of Evidence 104(a).

[94]See cases cited by the Advisory Committee in its Note to Federal Rule of Evidence 801.

[95]Federal Rule of Evidence 801(d)(2).

[96]As has been noted, the language of subsection 1390(a)(2) is not a model of clarity. On one hand, the subsection seems to require the introduction of "independent corroborative evidence" to support a finding of the foundational facts. On the other hand, the subsection provides that "a finding that the elements of subdivision (a) have not been met shall not be based solely on the unconfronted hearsay statement of the unavailable declarant". Perhaps what the author of subsection 1390(b)(2) has in mind is that a finding that the foundational elements *have been met* shall not be based solely on the hearsay statement of the unavailable declarant unless the finding is supported by independent corroborative evidence. Such a construction would be consistent with the California Supreme Court's decision in *Giles*.

California requirement, but this is not apparent from the language of Section 1390 or the bill analyses.

D. Proposed Section 240(a)(6).

SECTION 1. 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) If the declarant refuses to testify, notwithstanding imposition of sanctions, and the statement is offered against the party that has engaged or acquiesced in wrongdoing that was intended to, and did procure the unavailability of the declarant as a witness.

(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~~ *that* 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.

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.

AB 268 would amend Section 240 of the Evidence Code by adding a new ground of witness unavailability. It would allow a judge to declare as unavailable a declarant who "refuses to testify, notwithstanding imposition of sanctions, and the statement is offered against the party that has engaged or acquiesced in wrongdoing that was intended to, and did procure the unavailability of the declarant as a witness."

Some existing hearsay exceptions require the proponent to establish as a condition of admissibility the declarant's unavailability to testify. Among these are the exceptions for declarations against interest[97] and former testimony.[98] Unlike the Federal Rules of Evidence, the California Evidence Code does not expressly include the "contumacious" witness among those declarants who are deemed unavailable to testify. Federal Rule of Evidence 804(a)(2) defines, as unavailable, a declarant who "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so".[99]

The California courts, however, have construed a provision of Subsection 240(a) as embracing the contumacious witness in one circumstance. Witnesses who refuse to testify because of fear for their safety or that of their families can been declared unavailable under Subsection 240(a)(3).[100] This subsection defines, as unavailable, declarants who are unable to testify because of "then existing physical or mental illness or infirmity."[101] Proposed Subsection (a)(6) is an important step toward empowering California judges to declare contumacious witnesses unavailable without having to resort to other provisions. The proposed amendment does not go as far as the Federal Rule. A declarant who refuses to testify despite a court order to do so would be deemed to be unavailable under the amendment only if in addition the calling party establishes that the declarant was subject to sanctions and the statement is offered against a "party that has engaged or acquiesced in wrongdoing that was intended to, and did procure the unavailability of the declarant as a witness." Merely defying a court order to testify would be insufficient proof of unavailability.

Proposed Subsection (a)(6)'s intent-to-silence limitation should not be considered in isolation. Its value stems in part from Subsection 1390's failure to include a similar limitation. As has been noted, Subsection 1390(a)'s requirement that the unavailability of the declarant be "caused" by the opponent's "wrongdoing" sets out a causation element that is bereft of any mental state.[102] Any civil or criminal "wrongdoing" that happens to result in the declarant's unavailability would appear to satisfy Subsection's 1390(a)'s causation element, even if opponents did not anticipate that their "wrongdoing" might have that effect. To use Section 1390, the proponent also has to comply with Section 240's unavailability requirements. If the proponent relies on proposed Subsection 240(a)(6), the proponent will have to convince the judge (among other matters) that "the statement is offered against the party that has engaged or acquiesced in wrongdoing that was intended to, and did procure the unavailability of the declarant as a witness." The limitation can thus serve as an important check to the loss of the right to cross examine adverse witnesses under Section 1390.

Subsection (a)(6)'s prophylactic benefit is limited, however. A party invoking Subsection 1390(a)'s forfeiture doctrine is not required to rely on the new unavailability provision of Subsection

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[97]West's Ann. California Evidence Code § 1230.

[98]West's Ann. California Evidence Code §§ 1291-1292.

[99]Federal Rule of Evidence 804(a)(2).

[100]See, e.g., People v. Rojas, 15 Cal.3d 540, 550-551, 542 P.2d 229, 235-236, 125 Cal.Rptr. 357, 363-364 (1975).

[101]West's Ann. California Evidence Code § 240(a)(3).

[102]See text accompanying note 87supra.

(a)(6). That party may rely as well on any of the existing unavailability provisions of Subsection 240(a). The proponent of hearsay under Section 1390 thus may be able to circumvent the intent-to-silence limitation of Subsection (a)(6). The proponent, for example, could, under Subsection 240(a)(3), rely on the declarant's death as the ground of unavailability if the proponent can establish that the declarant's inability to attend the trial was brought about by the opponent's "wrongdoing" in killing the declarant.

The Federal Rules of Evidence provide a greater prophylactic benefit by placing the intent-to-silence limitation in Rule 804(b)(6)'s forfeiture doctrine.[103] This approach allows the Federal Rules to provide a broader ground of unavailability for contumacious witnesses without unduly risking the loss of the right to cross examine adverse witnesses.[104] California can achieve this result by eliminating the intent-to-silence limitation from Subsection 240(a)(6) and replacing Subsection 1390's causation element with the limitation.

Subsection (a)(6) should not be viewed as an effort to codify the unavailability requirement of the Sixth Amendment's forfeiture doctrine as spelled out in *Giles*. *Giles* holds that a judge should not find that the accused has forfeited his or her right to object on confrontation grounds unless the prosecution persuades the judge by a preponderance of the evidence that "the witness [is] genuinely unavailable to testify and the unavailability for cross-examination [was] caused by the defendant's intentional criminal act."[105] *Giles* does not limit the "intentional criminal act" to "wrongdoing that was intended to, and did procure the unavailability of the declarant as a witness." *Giles'* unavailability requirement is less stringent. It is sufficient for the prosecution to prove that the accused's intentional criminal act had the effect of preventing the hearsay declarant from testifying.[106]

If proposed Subsection (a)(6) is unnecessary to effectuate Subsection 1390(a) or to codify *Giles*, the Legislature has several options: (1) by enacting Subsection (a)(6) it can provide only a limited new ground for finding a contumacious witness to be unavailable; (2) by enacting a provision similar to Federal Rule of Evidence 804(a)(2), it can provide a broader new ground for finding a contumacious witness to be unavailable; (3) by enacting provisions similar to Federal Rules of Evidence 804(a)(2) and (b)(6), it can provide a broader new ground of unavailability while placing sensible constraints on the forfeiture of the right to cross examine adverse witnesses; or (4) by declining to enact any of these provisions, it can leave unchanged the existing grounds for finding a witness to be unavailable under Section 240(a).

The second option, however, would undermine current protections of the right to cross examine adverse witnesses. As has been explained,[107] Subsection 240(c) prevents proponents from using a crime victim's fear of the defendant to establish the victim's unavailability to testify under

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[103]See Federal Rule of Evidence 804(b)(6).

[104]See Federal Rule of Evidence 804(a)(2).

[105]People v. Giles, 40 Cal.4th 833, 854, 152 P.3d 433, 446, 55 Cal.Rptr.3d 133, 148 (2007).

[106]Id. at 849, 152 P.3dat 443, 55 Cal.Rptr.3d 133 at 144.

[107]See note 88 supra.

Subsection 240(a)(3) ("existing physical or mental infirmity"), unless expert testimony "establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma."[108] Without the expert witness requirement, a serious erosion of the right of cross-examination would occur if crime victims could be declared unavailable solely on the basis of their fear of the accused. Accordingly, more than mere inconvenience, including the anguish and physical discomfort that testifying can produce, is required to find fearful crime victims unavailable to testify on the ground of "mental infirmity."[109] If the intent-to-silence limitation is eliminated from Subsection 240(a)(6) without adding it to Subsection 1390(a), proponents of hearsay under Section 1390 could bypass Subsection 240(c)'s expert testimony requirement by establishing the declarant's unavailability under a stripped down version of Subsection 240(a)(6) instead of under Subsection 240(a)(3).

Choosing the fourth option would not affect the *Giles* prima facie case. As a matter of Sixth Amendment jurisprudence, prosecutors would still be entitled to prove that the defendant has forfeited his or her right to object on confrontation grounds. Nor would choosing the fourth option affect Section 1390's prima facie case. Prosecutors and other parties would still be entitled to prove that the declarant's unavailability on existing grounds (death, for example) was in the words of Subsection 1390(a) "caused" by "wrongdoing" engaged or acquiesced in by the party against whom the hearsay declaration is offered. But by choosing one of the first three options, the Legislature would provide proponents (including prosecutors) with an additional ground for urging the judge to find the hearsay declarant unavailable to testify.

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[108]West's Ann. California Evidence Code § 240(c).

[109]People v. Williams, 93 Cal. App. 3d 40, 54, 155 Cal. Rptr. 414, 421 (1979).

COMMENTS OF PROF. JEFFREY FISHER

From: Jeffrey Fisher
Re: CLRC study of forfeiture by wrongdoing
Date: October 11, 2007
To: Barbara Gaal

Dear Barbara,

This is so well done that I think an email making a couple of observations will suffice. But I hasten to add that I would be more than happy to talk with you further about any of this or to draft anything else you think might be helpful to your commission or the committee. In making these comments, I am acting as best as I can in the role of law professor, though of course you know that I have been an active participant in confrontation clause litigation and that I represent Mr. Romero in his pending case in the Supreme Court.

1. The biggest issue in the forfeiture world, as you recognize, is whether an intent requirement is required. Let me add a few things that might be worth considering, if you haven't done so already:

a. It's important to keep in mind that the question whether intent is required isn't necessarily an all-or-nothing issue. The Illinois Supreme Court recently held a case *not* involving the death of the declarant that the Constitution does require a showing of intent. (The only other state supreme court to address the issue in this context also has held that intent is required. See *People v. Moreno,*160 P.3d 242 (Colo. 2007).) After acknowledging that several state supreme courts (like Giles) have held in cases involving the death of the declarant that intent is not required, the Illinois Supreme Court added: "Notwithstanding that [these] cases contain broader language, [these] cases have essentially held that the prosecution need not *prove* that the defendant committed murder with the intent of procuring the victim's absence. This is consistent with presuming such intent when the wrongdoing at issue is murder. When a defendant commits murder, notwithstanding any protestation that he did not specifically intend to procure the victim's inability to testify at a subsequent trial, he will nonetheless be sure that this would be a result of his actions.... Although we express no opinion on the topic, as it is not before us on this appeal, the total certainty that a murdered witness will be unavailable to testify could theoretically support presuming intent in the context of murder, while requiring proof of intent in all other situations." People v. Stechly, 870 N.E.2d 333, 352-53 (Ill. 2007). Regardless of whether this fairly captures the intent of Giles and similar cases, I think the Illinois Supreme Court is correct at least to the extent it suggests that resolution of the intent question might differ depending on whether the declarant has been killed. So legislators might want to keep this in mind both as a potential constitutional outcome of the current debate and as a possible statutory solution, especially as caselaw develops and the Supreme Court eventually grants cert in one kind of case or another.

b. A related point is that I think it's important for someone seriously considering dispensing with an intent requirement across the board (that is, not just in cases involving the delarant's death) to consider the implications of doing so. It's my understanding that many prosecutors believe and are starting to argue in court that if intent is not required, then courts should find not only that defendants on trial for homicide have forfeited their right to confrontation when sufficient proof in a pretrial hearing shows that they caused the victim's death, but also that courts should find that defendants on trial for domestic and child abuse have forfeited their right to confrontation when sufficient proof at a pretrial hearing shows that they committed those crimes. In other words, prosecutors are beginning to take the position that the very nature of domesitc or child abuse is that it makes the victim afriad or otherwise unwilling to testify and thereby triggers forfeiture. This is obviously a huge issue, for it essentially decides whether abuse procecutions are exempt from the reach of the confrontation clause. And for that reason, I think that a conscientious legislator should consider (i) whether he/she thinks that result is constitutional; (ii) whether that result is good policy; and (iii) whether any new statute expanding forfeiture beyond instances of specific intent should come right out and say whether a pretrial showing of abuse is sufficient to trigger forfeiture. If a no-intent-required law is enacted and (iii) is left unaddressed, the Legislature can expect that this statutory issue (not to mention related constitutional issues, so long as they remain unsettled) will be the subject of widespread and intense litigation, presumably involving numerous "battles of the experts" and likely involving disparate and conflicting decisions depending on each judge's point of view.

c. Finally, one should be aware of ambiguity that could result if statutory language were enacted that speaks in terms of the wrongful conduct that "caused" the declarant to be unavailable. Tort law generally requires a "cause" to be a "but for" cause and to trigger a foreseeable result. Would the proposed statutory language incorporate these concepts? Or would it simply require the defendant's conduct to be "a" cause of the declarant's unavailability, and/or extend to results that were unforeseeable (such as purchasing a plane ticket for someone and then the plane crashes or feeding them food but not knowing they have a rare allergy from which they die)? It may be useful for any enactment to so specify.

2. You note at pp 13-14 that some pre-Crawford studies estimated that about 80% of domestic violence victims recant or refuse to testify. That is a powerful statistic, and one that may reasonably push many legislators to think that strong medicine is necessary to address that problem. Without seeking to dissuade you in any way from noting these studies, I think it's important to emphasize that the studies all were conducted before Crawford was announced. In the pre-Crawford world, prosecutors had little or no legal incentive to bring such accusers into court, so many did not try very hard to do so. By contrast, in the few pre-Crawford jurisdictions that implemented policies and programs aimed at ensuring the victims of domestic violence come to court (one of which, I believe, was Cook County, Illinois), victims apparently cooperated in up to 95% of cases. (I'm attaching the brief that the ACLU filed in Davis, which discusses this issue. See especially the interest of amici section and Part IV.) It might be worthwhile to present this data so legislators realize that there may be approaches besides enacting a broad

forfeiture provision available to combat the problem of reluctant witnesses in domestic violence cases.

I hope this helps and, as I said, let me know if I can be of further assistance.

Best, Jeff