

Memorandum 2007-54

**Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing
(Comments on Tentative Recommendation)**

The Commission's tentative recommendation on forfeiture by wrongdoing was sent out for comment and posted to the Commission's website in early November. Thus far, the Commission has received the following comments:

	<i>Exhibit p.</i>
• Michael Judge, Los Angeles County Public Defender and California Public Defenders Ass'n (11/29/07)	1
• Jeff Rubin, California District Attorneys Ass'n, and Eve Sheedy, Los Angeles City Attorney's Office (12/7/07)	5
• Prof. Gerald Uelmen, Santa Clara University School of Law (11/5/07)	12

This memorandum discusses those comments. It also discusses:

- (1) Comments previously submitted by Prof. James Flanagan (University of South Carolina School of Law), which were attached to but not analyzed in the Third Supplement to Memorandum 2007-41.
- (2) Some aspects of comments previously submitted by Prof. Miguel Méndez (Stanford Law School), which were attached to but not analyzed in the Third Supplement to Memorandum 2007-41. Other aspects of these comments were discussed at the October meeting or do not require discussion at this time.

A supplement to this memorandum will discuss a number of initiative measures that are in preparation. The staff will distribute the supplement at the upcoming meeting.

The Commission's final report on forfeiture by wrongdoing and related issues is due by March 1, 2008. Because of that deadline, the comment period for the tentative recommendation was unusually short (one month as opposed to the normal three months). The tentative recommendation indicated that comments would be most helpful if received by December 3, 2007, but comments would still be accepted later and considered to the extent possible.

Any California Law Revision Commission document referred to in this memorandum 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.

The staff hopes that additional input will still arrive. We recommend that the Commission **use the December meeting primarily as an opportunity to hear from interested persons and discuss the issues among the members of the Commission.** The Commission can wait until January to make decisions regarding the content of its final recommendation. The staff will then prepare a draft of a final recommendation, which the Commission can refine as needed at the February meeting.

This memorandum is organized as follows:

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SUMMARY OF TENTATIVE RECOMMENDATION

The tentative recommendation addresses two main topics, which are to some extent interrelated.

First, the tentative recommendation proposes to revise the statutory definition of when a declarant is “unavailable as a witness” (Evid. Code § 240). The proposed amendment would expressly recognize that a witness who refuses to testify or lacks memory of the subject matter of a statement is unavailable.

Second, the tentative recommendation discusses forfeiture by wrongdoing as an exception to the hearsay rule. It describes four possible statutory approaches:

Option #1. Repeal California’s existing provision on forfeiture by wrongdoing (Evid. Code § 1350) and replace it with a provision that tracks the constitutional minimum.

Option #2. Replace the existing provision with one similar to the federal rule (Fed. R. Evid. 804(b)(6)).

Option #3. Broaden the existing provision to a limited extent, with the possibility of further revisions later.

Option #4. Leave the law alone until there is further judicial guidance.

The tentative recommendation cautions that Option #1 is inadvisable because the United States Supreme Court has not yet given guidance on key aspects of the constitutional minimum. The tentative recommendation describes the other options as reasonable possibilities and solicits comment on which approach is preferable.

THE DEFINITION OF UNAVAILABILITY

A few of the comments relate to Evidence Code Section 240, which defines when a declarant is “unavailable as a witness.” Some remarks pertain to a witness who refuses to testify; others pertain to a witness who lacks memory of the subject matter of a statement.

Unavailability of a Person Who Refuses to Testify

Prof. Gerald Uelmen (Santa Clara University School of Law) fully supports the Commission’s recommendation to “extend the definition of ‘unavailability’ in Evidence Code Section 240 to conform with the Federal Rules of Evidence.” Exhibit p. 16. He notes that the “oversight of not including a witness who refuses to testify despite a grant of immunity has led to some contorted court rulings treating the refusal as a ‘mental disability.’” *Id.* Although that approach works when the motivation for the refusal is fear, Prof. Uelmen points out that other motivations are possible, such as loyalty. *Id.* For example, a brother may be

unwilling to testify against his sister, or a mother may be unwilling to testify against her son, yet neither the brother nor the mother could validly claim any privilege. The proposed amendment of Section 240 would recognize that such a witness is unavailable, so long as the court has taken reasonable steps to induce the witness to testify.

Like Prof. Uelmen, the California District Attorneys Association (hereafter, "CDAA") and the Los Angeles City Attorney's Office (hereafter, "LA City Attorney's Office") support the proposed reform relating to a refusal to testify. Exhibit p. 5. They also "like the proposed CLRC Comment to the enactment of this legislation." *Id.*

Thus far, this proposed reform appears uncontroversial.

Unavailability of a Person Who Cannot Testify Due to Memory Loss

Proposed new subdivision (a)(7) would state that a witness is unavailable if the witness is "[p]resent at the hearing but lacks memory of the subject matter of the declarant's statement." Prof. Uelmen's supportive remarks appear to encompass this reform, but he does not specifically refer to it. See Exhibit p. 16.

CDAA and the LA City Attorney's Office voice some concerns about this reform. See Exhibit pp. 5-6. **When time permits, the staff will research those matters and report back to the Commission.**

Unless the Commission otherwise directs, this will be a relatively low priority. Although the Legislature asked the Commission to address unavailability due to a refusal to testify by March 1, 2008, it did not ask the Commission to address unavailability due to memory loss. The tentative recommendation deals with the latter issue because the Commission previously studied it to some extent and it involves the same provision as unavailability due to a refusal to testify. **The Commission could always delete new subdivision (a)(7) from its report for this study and consider unavailability due to memory loss at a later time.**

FORFEITURE BY WRONGDOING

The bulk of the comments relate to forfeiture by wrongdoing as an exception to the hearsay rule. We begin by discussing the two petitions for *certiorari* that are pending before the United States Supreme Court. Then we discuss the comments on each of the four options.

Petitions for *Certiorari* Pending Before the United States Supreme Court

As explained at pages 23-24 of the tentative recommendation, two cases relating to forfeiture by wrongdoing are now pending before the United States Supreme Court: *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), and *People v. Giles*, 40 Cal. 4th 833, 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). Briefing of the *Giles* petition is still in progress. The Court has not yet ruled on either petition.

The question presented in the *Romero* petition is:

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 question presented in the *Giles* petition is:

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?

The two petitions differ in precisely how they describe the status of the law on this subject. Both petitions acknowledge that the lower courts are badly divided. At page 7, the *Romero* petition says:

American courts that have considered the forfeiture by wrongdoing doctrine in the wake of *Crawford* and *Davis* have answered that question in at least three different ways. As shown below, the largest group — seven states, plus the Sixth Circuit Court of Appeals — holds that the defendant’s motive does not matter.

A second group, consisting of Illinois and Colorado, holds that the defendant’s motive does matter, at least sometimes. ... Those courts hold, in essence, that the constitutional forfeiture rule is coextensive with Federal Rule of Evid. 804(b)(6). In *dicta*, however, both courts suggested that a different rule might apply when the defendant has killed the witness.

New Mexico is alone in the third group. It is the only American jurisdiction to adopt the extreme position that the constitutional forfeiture rule is coextensive with Fed. R. Evid. 804(b)(6) even when the defendant kills the witness.

At page 10, the *Giles* petition says:

Since *Crawford* was decided in March of 2004, ten state supreme courts and one federal circuit court of appeals have ruled on the question whether intent to silence is an element of the forfeiture by wrongdoing rule. These courts have split on the issue six to five.

Each petition provides relevant case citations, which the staff has reviewed. Many of the cases include good discussions of the intent to silence issue. A few are more cursory and not altogether clear on the point. Some of the decisions cited in the *Romero* petition are by intermediate appellate courts rather than by the state supreme court. These factors account for the differing numbers quoted in the petitions.

Both petitions emphasize the magnitude of the issue. At page 14, the *Romero* petition says:

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

[Citation omitted.] 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.

At pages 15-16, the *Giles* petition says:

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 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. [Citations omitted.] 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.

Given the sharply divided state of the law and the magnitude of the issue, these petitions for *certiorari* may have a better chance of being granted than the typical petition for *certiorari*. CDAA and the Los Angeles City Attorney's Office note that approximately 7,500 such petitions are presented each year, but only between 80 and 150 are granted. Exhibit p. 7. Prof. Uelmen says the *Giles* petition "is likely to be granted" and "it is highly likely that the current majority on the U.S. Supreme Court will ... rule that the forfeiture by wrongdoing exception to the constitutional right of confrontation applies even if there was no showing the defendant killed the victim with the intent of preventing her testimony." Exhibit p. 13. In contrast, the California Public Defenders Association (hereafter, "CPDA") and the Los Angeles Public Defender's Office (hereafter, "LA Public Defender's Office") say it is futile to try to predict how the Court will respond to the petitions for *certiorari*. Exhibit p. 2.

Even if the Court grants *certiorari* in one or both cases, it might not fully resolve the intent to silence issues. Some of the lower courts have indicated that the rule might differ depending on whether the declarant is dead or alive. It is possible that the Court would issue a narrow opinion, providing guidance as to one of these situations but not the other.

Although there is much uncertainty about whether the petitions will be granted and how the Court might resolve the merits, it is probable that the Court will act on the petitions in the next month or so. **The staff will promptly inform the Commission when the Court acts.**

With this background on the status of the petitions for *certiorari*, we turn to the comments on the four different options described in the tentative recommendation.

Option #1. Replace Evidence Code Section 1350 With a Provision That Tracks the Constitutional Minimum As Enumerated By the California Supreme Court

Option #1 is to repeal the existing provision on forfeiture by wrongdoing (Evid. Code § 1350) and replace it with a provision that tracks the constitutional minimum as enumerated by the California Supreme Court in *Giles*, which is now pending before the United States Supreme Court. This approach would eliminate intent to silence as a requirement for forfeiture. In footnote 145, the tentative recommendation says a new provision along these lines could perhaps be drafted as follows:

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.

This approach drew both support and opposition.

Support

CDAA and the LA City Attorney's Office "recognize that *if* the petition for writ of certiorari filed in *Giles* or *Lopez* is granted, caution should be exercised in adopting a hearsay exception that incorporates aspects of the forfeiture by wrongdoing doctrine that will be subject to challenge in the United States Supreme Court." Exhibit p. 6. We assume they mean to refer to *Romero* rather

than *Lopez*. If there is a *Lopez* case presenting similar issues to the United States Supreme Court, we would appreciate hearing about it.

CDA and the LA City Attorney's Office further say that if the petitions are denied, "legislative efforts should be directed at ensuring adoption of the most defensible and practical version of the forfeiture by wrongdoing hearsay exception — the version described in the Recommendation at p. 21 as a new provision on forfeiture by wrongdoing 'that tracks the constitutional minimum' as is done in AB 268." Exhibit p. 7. They think it would be a mistake to wait for the United States Supreme Court to "eventually take up an issue they have already declined to review" *Id.*

They refer to Option #1 as "the *Giles* approach" and explain that it should be adopted because "[p]rosecutions are prevented or hobbled when witnesses are eliminated or deterred from testifying." *Id.* They observe that witness intimidation is a widespread problem: "Talk to any prosecutor handling gang cases, homicides, domestic violence, etc., and he or she will tell you that witness intimidation occurs in the *majority* of their prosecutions." *Id.* (emphasis in original).

They also point out that

[v]ictims of crimes, especially domestic violence victims, often do not report the threats or acts of violence perpetrated against them to the police. However, some reports do get made to the police and even if reports are not made to the police, the victims may report the threats or assaults to friends or relatives. When the victims are killed by the people who had previously assaulted or threatened them, the best, most probative, and relevant evidence of the identity and motive of the perpetrator can be these previous reports and yet they are inadmissible.

Id. at 8 (citation omitted). They conclude that a "working forfeiture by wrongdoing hearsay exception takes away some of the incentive to murder or dissuade the victim from testifying at the preliminary examination and will, without question, save the lives of some witnesses." *Id.*

Anticipating objections that the *Giles* approach will result in admission of unreliable evidence, CDA and the LA City Attorney's Office state that "the doctrine of forfeiture by wrongdoing is not concerned with reliability." *Id.* at 9. They say that "when it comes to hearsay exceptions based on equitable concerns, the potential lack of reliability simply takes a backseat to the fact the law will not allow a person to capitalize on an unfairness the person has created." *Id.* They

also note that a court always has discretion to exclude a seemingly unreliable statement pursuant to Evidence Code Section 352. *Id.* at 10.

Opposition

CPDA and the LA Public Defender's Office "concur in the Law Revision Commission's conclusion that Option #1 is inadvisable since there is no cognizable constitutional minimum which can be extracted from the existing body of case law." Exhibit p. 1.

These groups also say that Option #1 and the other suggested reforms of Evidence Code Section 1350 "are premised on a faulty assumption which ignores the inherent unreliability of hearsay evidence and recklessly assumes the hearsay declarant's motives are pure and the hearsay statements being offered are trustworthy and accurate." *Id.* According to CPDA and the LA Public Defender's Office, those assumptions "dangerously ignore a multitude of circumstances in which alleged complaining witnesses make false accusations against innocent defendants." *Id.* at 1-2. Thus, the groups believe that the suggested reforms "will adversely affect the ability of an innocent criminal defendant to test the reliability of the evidence offered against him or her in trial via meaningful cross-examination." *Id.* at 2. The groups state that hearsay evidence "is intrinsically inferior proof to live testimony and any attempt to liberalize its admissibility erodes the truth seeking process of the justice system." *Id.* They note that the Commission has not presented any empirical evidence for a change in the law, and they comment that an "unequivocal need for reform should be demonstrated before any new legislation is proposed." *Id.* at 1, 2.

Along similar lines, Prof. Uelmen warns that if California adopts a hearsay exception tracking the California Supreme Court's approach in *Giles*, that would essentially eliminate the presumption of innocence in a murder case:

[T]he California Supreme Court construed the concept of forfeiture by wrongdoing to create the broadest conceivable exception to the constitutional right of confrontation. If a hearsay exception is available, virtually any relevant out of court statement by the victim of a homicide will be admissible, where it is "testimonial" or not, since the homicide ... defendant is accused of render[ing] the victim unavailable. While the defendant's responsibility for the unavailability of the victim is a preliminary fact which must be established before the statement is admitted, the Court ruled that it only need be established by a preponderance of the evidence. Thus, the prosecution need only tender evidence to prove its case by a preponderance to open the gates for the victim's statements to be

admitted. *Once they are admitted, in most cases a guilty verdict will be foreordained.*

Exhibit p. 13 (emphasis added).

Prof. Flanagan has written several articles on forfeiture by wrongdoing and he is helping to represent the petitioner in *Giles*. He “concur[s] that it is premature to eliminate the intent requirement before the Supreme Court addresses the issue.” Third Supplement to CLRC Memorandum 2007-41, Exhibit p. 1. He also “strongly concur[s] with Professor Fisher’s comments about giving careful consideration to the consequences of a broad forfeiture by wrongdoing rule for certain categories of cases” *Id.* at Exhibit p. 2. Prof. Fisher had previously pointed out that eliminating the requirement of intent to silence might essentially render the Confrontation Clause inapplicable to homicide prosecutions and abuse prosecutions. See First Supplement to CLRC Memorandum 2007-41, Exhibit p. 23.

Other Comments

Prof. Méndez suggests that if California adopts a hearsay exception tracking the California Supreme Court’s approach in *Giles*, the exception should “limit the hearsay that is admissible to the kind of hearsay that is believed to possess ‘circumstantial guarantees’ of trustworthiness.” Third Supplement to CLRC Memorandum 2007-41, Exhibit p. 5; see also First Supplement to CLRC Memorandum 2007-41, Exhibit p. 14. He notes that an exception based on *Giles* would not screen out evidence that is bereft of circumstantial guarantees of trustworthiness. Third Supplement to CLRC Memorandum 2007-41, Exhibit p. 5. He says this “is a good reason to give the judge the power to exclude the declaration offered in the case being tried whenever the judge concludes that the circumstances surrounding its making fail to inspire belief in its trustworthiness, notwithstanding the fact that the formal foundational elements have been met.” *Id.*

Prof. Flanagan makes a different drafting suggestion. Prof. Fisher previously pointed 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.” First Supplement to CLRC Memorandum 2007-41, Exhibit p. 4. He said that if a hearsay exception based on *Giles* were adopted, consideration should be given to clarifying certain points relating to causation. *See id.* Prof.

Flanagan shares Prof. Fisher's concern about this ambiguity and the need for clarification. Third Supplement to Memorandum 2007-41, Exhibit p. 2.

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

Option #2 is to replace Evidence Code Section 1350 with a provision modeled on the federal rule, as follows:

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.

Like the comments on Option #1, the comments on Option #2 are sharply divided.

Support

Prof. Uelmen supports Option #2. Exhibit p. 14. He thinks it is the "best hope of preserving the requirement that intent to procure the unavailability of the declarant as a witness must be shown." *Id.* He gives two reasons for supporting Option #2.

First, he mentions "the desirability of consistency." *Id.* at 15. He notes that "[m]ost states have adopted the federal rules of evidence as their state evidence code, and already have Rule 804(b)(6) on the books." *Id.* He says that there "does not appear to be any reason for California to go its own way with a broader hearsay exception than that which is recognized in federal law and the law of most of our sister states." *Id.* He warns that such a step might even cause prosecutors to bring some cases in state court rather than in federal court, so that they can take advantage of the new exception. *Id.*

Second, Prof. Uelmen supports Option #2 because he believes that "the constitutional minimum of the Right of Confrontation should not define the only circumstances where cross examination is necessary to test the credibility of testimony." *Id.* at 14. He points out that "the forfeiture by wrongdoing exception will *only* result in the admission of testimonial statements." *Id.* at 15 (emphasis added). In contrast, a "broad hearsay exception for forfeiture by wrongdoing ... lets in lots of hearsay that is not even subject to Sixth Amendment protection." *Id.* (emphasis added). In particular, he fears that often "the forfeiture rule will be

utilized to admit statements to establish prior acts, which do not relate to the circumstances of the homicide, but circumstantial factors such as motive.” *Id.* He cautions that admitting such hearsay is “akin to ‘punishing’ the defendant for the crime of which he has not yet been convicted, by limiting his ability to defend himself through the tool of cross examination.” *Id.*

Prof. Uelmen thus believes that the hearsay rule should be more restrictive than the constitutional minimum in admitting hearsay on forfeiture grounds. In advocating Option #2, he explains:

We need to return to the basic values that led to the widespread acceptance of the hearsay rule in the first place: the preference for testimony to be presented in court, where the witness can be sworn, and his or her demeanor observed while they are testifying. Cross examination provides an opportunity to probe for the bias or exaggeration or motive to lie that are crucial to the jury’s fact-finding role. These concerns are at their greatest in a homicide case, where the victim’s prior statements may have been motivated by undisclosed bias or rancor.

Id. at 14-15.

Opposition

CDA and the LA City Attorney’s Office oppose Option #2. They say that adopting the federal approach would “not adequately address the need for the hearsay exception as evidenced by the rarity of cases in which the federal hearsay exception is used.” Exhibit p. 8. They explain that “[b]y requiring a showing of an intent to procure the unavailability of the witness, it becomes next to impossible to use a statement made by a person before the crime, for which the defendant is on trial, occurred.” *Id.* They illustrate this point with examples, and then conclude:

Simply put, most murders and acts of domestic violence are not committed with the intent to prevent the witness from testifying but nevertheless have the same exact effect of making the witness unavailable as crimes committed with the intent to prevent the witness from testifying. The defendant still profits from his own wrong.

Id. at 8-9 (citations omitted).

CPDA and the LA Public Defender’s office oppose Option #2 for different reasons. See Exhibit pp. 1, 2-3. They view it as an “ill advised reactionary attempt[t] to unnecessarily revise Evidence Code section 1350.” *Id.* at 1.

They explain that “a pervasive uncertainty surrounds the doctrine of forfeiture by wrongdoing,” making it unrealistic to expect that modeling the California provision on the federal rule would result in consistency at the federal and state level. *Id.* at 2. In particular, they say that the following issues are unresolved:

- (a) whether the wrongdoing that caused the unavailability must be intended to cause the witness’ unavailability;
- (b) whether the forfeiture by wrongdoing doctrine applies when the witness colluded with a party to procure his unavailability.
- (c) whether the forfeiture by wrongdoing doctrine applies when an alleged coconspirator, not the defendant, causes the unavailability.
- (d) whether reflexive application of the forfeiture rule is proper — i.e., when the act alleged to support the forfeiture is the same act for which the accused is currently on trial;
- (e) what is the appropriate burden of proof applicable to the doctrine of forfeiture by wrongdoing — i.e., a clear and convincing standard of proof or a preponderance standard;
- (f) whether a separate evidentiary hearing outside the presence of the jury to hear the evidence supporting introduction of the statement under the federal rule is required, and
- (g) whether the unavailable witness’s statement at issue can be used to establish the wrongdoing.

Id.

CPDA and the LA Public Defender’s Office also state that Option #2 “fails to provide procedural reciprocity and creates a potential Fourteenth Amendment violation by limiting the admissibility of statements to those ‘offered against a party who has engaged or acquiesced in wrongdoing.’” *Id.* at 3 (emphasis in original). They explain that a police officer or other prosecution witness is not considered a party and thus “Option #2 proposes legislation which could only be used against a criminal defendant and exclusively benefits the prosecutor.” *Id.* Citing *Wardius v. Oregon*, 412 U.S. 470 (1973), they maintain that this lack of reciprocity is “fatal under the Fourteenth Amendment.” Exhibit p. 3.

Wardius arose in a different context — reciprocity of discovery relating to alibis in a criminal case. The staff has not had time to research the extent to which the reasoning of *Wardius* can be extended to the context at hand. **We will look into this.**

Other Comments

Prof. Flanagan does not take a position on the general concept of adopting Option #2. He points out, however, that the federal rule “reaches beyond those who directly tamper with the witness to include those who ‘acquiesce’ in the wrongdoing.” Third Supplement to CLRC Memorandum 2007-41, Exhibit p. 1. In his view, the term “acquiesce” is particularly inappropriate, “because it includes not only those who agree and encourage the wrongdoing, but also those who merely accept the wrongdoing without agreeing to it.” *Id.* He considers this problematic. *Id.*; 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). He notes that Tennessee’s forfeiture rule uses the language of the federal rule but “omit[s] ‘acquiesce’ because of its inherent flexibility.” Third Supplement to CLRC Memorandum 2007-41, Exhibit p. 1.

In communications with the staff, Prof. Méndez has also expressed concern about use of the term “acquiesce.” He thinks the federal rule, and any rule that may be modeled on it, should refer to a statement “offered against a party that has engaged in *or was an accomplice to* wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.” (Emphasis added.) He has not yet provided an explanation of this suggested approach, but he has promised to do so.

CDA and the LA City Attorney’s Office see no problem with use of the term “acquiesce,” whether in a provision based on *Giles* (Option #1), a provision modeled on the federal rule (Option #2), or a revision of Evidence Code Section 1350 (Option #3). They say that the

major problem with failing to include the term acquiesce (language which is included in AB 268) is that any version of the forfeiture by wrongdoing hearsay exception which does not include the term “acquiesce” or comparable language will fail to cover the very common situation of the incarcerated defendant whose cronies on the outside say to him, “Hey, we’ll take care of your witness problem” followed by the defendant explicitly or implicitly approving the elimination of the witness by word, gesture, or even silence.

Exhibit p. 11. They also observe that “the term is used in the federal system and most other states that have adopted the exception, but we are not aware of any

court that has found the term unconstitutionally vague nor any case indicating there have been problems in applying the term.” *Id.*

The staff plans to do more research on use of the term “acquiesce” in this context, particularly after we receive Prof. Méndez’s analysis of this point.

Option #3. Broaden Evidence Code Section 1350 to a Limited Extent, with the Possibility of Further Revisions Later

Option #3 is to broaden Evidence Code Section 1350 to a limited extent, with the possibility of further revisions after the United States Supreme Court provides further guidance on the requirements of the Confrontation Clause. A possible amendment along these lines is shown at pages 38-39 of the tentative recommendation.

Support

Option #3 received no clear support.

Opposition

Prof. Uelmen opposes Option #3 because it “opens the door to legislative tinkering which could lead to a long, drawn-out period of uncertainty.” Exhibit p. 16. He notes that this “is an area where the trial courts need clear guidance.” *Id.* Consistent with his advocacy of Option #2, he notes that the federal rule “has been widely construed and applied, and provides a relatively simple test for the courts to apply.” *Id.*

CPDA and the LA Public Defender’s Office also oppose Option #3. Exhibit pp. 1, 3. They view it as a “less radical” proposal than Option #2, but “still unwarranted.” *Id.* at 3. They explain:

The decision whether to adopt the proposed amendment requires a choice between the fundamental principle that an accused criminal defendant has the right to confront and cross-examine the witnesses against him or her and the embryonic concept of forfeiture by wrongdoing.

The proposed expansion of the forfeiture by wrongdoing concept as drafted in Options #2 and #3 invites the admission of unreliable testimony and the conviction of innocent defendants. A criminal defendant’s Constitutional right to confront and cross-examine the veracity of a witness’s statement against him or her should not be sacrificed without further guidance from the United States Supreme Court.

Id.

CDA and the LA City Attorney's Office likewise oppose Option #3, but for different reasons. They consider Evidence Code Section 1350 "utterly ineffective," as their legal research disclosed only one reported case in which the provision was used "to good effect." Exhibit p. 8. They say that

[c]onsidering the thousands of cases every year in which witnesses are dissuaded from testifying or killed after having given statements potentially implicating the perpetrator, the presence of section 1350 may well be worse than having no exception at all since its presence conveys the impression that California actually has a viable forfeiture by wrongdoing exception when, in fact, it exists in name only.

Id. In their opinion, "a plan to retain section 1350 or mildly tinker with its language (respectively, options #4 and #3) does not meet or even address the need for legislation enabling California courts to utilize the forfeiture by wrongdoing exception." *Id.*

Other Comments

Prof. Flanagan does not take a position on Option #3. He notes, however, that "Section 1350 is a carefully drafted and limited expression of the forfeiture by wrongdoing rule." Third Supplement to CLRC Memorandum 2007-41, Exhibit p. 2. He cautions that "[t]he drafters of any amendments should carefully choose any language that broadens the statute's application to avoid creating a rule that makes it easy to use in situations where the witness might well have testified." *Id.*

Prof. Flanagan also points out that "the courts that developed the hearsay exception for forfeiture by wrongdoing never maintained that the reliability of the victim's hearsay statements justified their admissibility." *Id.* at 1. He says that "legislators drafting an exception to the hearsay rule must be concerned about the reliability of the absent witness's statements, particularly when the circumstances in which they are made do not provide any indication they are reliable, and there is no cross-examination." *Id.* He notes that Section 1350 addresses reliability through the requirements of subdivisions (a)(2)-(a)(4), which provide:

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:

....

(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.

He advises that the Legislature “should give serious consideration to maintaining those requirements in any revision of the statute to provide procedural protections against unreliable hearsay.” *Id.*

Option #4. Leave Evidence Code Section 1350 Alone Until There Is Further Judicial Guidance

Option #4 is to leave Evidence Code Section 1350 alone, at least until there is further judicial guidance. The comments on this option were divided.

Support

CPDA and the LA Public Defender’s office support Option #4. They state that by adopting this option, “the Commission will do what is best for California.” Exhibit p. 3. They explain:

Prematurely drafting legislation in this uncertain legal climate, where legal scholars have more questions than answers, is an endeavor ripe with risk. At stake is the viability of the Confrontation Clause, a defendant’s Sixth Amendment right to a fair trial, and ultimately, the truth seeking process of the criminal justice system. We urge this Commission to adopt a prudent and deliberative position and adopt Option #4, “leaving Evidence Code section 1350 alone until there is further judicial guidance” rather than adopt legislation in a vacuum thus endangering a criminal defendant’s right to a fair trial.

Id. at 1.

Opposition

CDA and the LA City Attorney’s Office oppose Option #4 for the same reasons that they oppose Option #3, which are described above. See Exhibit p. 8.

Prof. Uelmen opposes Option #4 on a different basis. He says:

The guidance to come from the courts will be limited to the dimensions of the constitutional right of confrontation, not the underlying wisdom of excluding hearsay and preserving the opportunity to cross examine. The underlying policies that support the exclusion of hearsay evidence are appropriate concerns for the legislature, and there is no compelling reason to wait until the constitutional litigation is fully played out before the legislature acts.

Exhibit p. 16.

In other words, Prof. Uelmen believes that the Legislature already has sufficient information to conclude that Option #2 (adopting a forfeiture provision like the federal rule) will be the best approach for California, not only in the short term but also in the long term. He is convinced that the forfeiture statute should require proof that the defendant intended to silence the declarant. Thus, he does not consider it necessary to wait and see how the United States Supreme Court rules on whether the Confrontation Clause requires such proof.

The Big Picture

From the foregoing discussion, it should be clear that **this is a divisive area, a battleground between defense and prosecution interests.**

The prosecution groups (CDAA and the LA City Attorney's Office) advocate Option #1, replacing Evidence Code Section 1350 with a provision that would eliminate the intent to silence requirement and track the constitutional minimum as enumerated by the California Supreme Court in *Giles*. The defense groups (CPDA and the LA Public Defender's Office) advocate the other extreme, Option #4, which would leave Section 1350 intact.

The law professors take more moderate positions. Prof. Uelmen likes Option #2, replacing Section 1350 with a provision modeled on the federal rule. Prof. Flanagan does not advocate a particular option. His comments acknowledge the possibility of revising Section 1350, but he suggests caution in doing so.

In preparing this memorandum, the staff has not attempted to incorporate the views expressed in comments that were analyzed before the tentative recommendation was issued. For the January meeting, we will summarize all of the input received in this study. For now, it suffices to say that the earlier comments were also divided as to the proper approach.

Further input may help the Commission determine how to proceed. **We continue to encourage interested individuals and organizations to express**

their views on how the Evidence Code should address forfeiture by wrongdoing.

In evaluating the input, the Commission should bear in mind that its role is to assist the Legislature in making policy choices, not to be the ultimate decisionmaker on divisive issues of policy. The Commission has extensive legal expertise, so it may be able to evaluate some matters more readily than the Legislature, such as the need for guidance from the United States Supreme Court before enacting legislation that takes a particular approach. On matters such as these, it is appropriate for the Commission to make a recommendation to the Legislature.

On other points, however, the competing considerations may be just as easy for the Legislature to evaluate as for the Commission to evaluate. **With respect to points like these, the Commission should consider the possibility of simply explaining the relevant considerations in its report to the Legislature, rather than taking sides.** That may be the soundest approach in a volatile area such as this, which appears to be far more controversial than most issues the Commission is able to effectively address.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel



MICHAEL P. JUDGE
PUBLIC DEFENDER

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EXECUTIVE OFFICE

November 29, 2007

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

To Members of the Commission:

On November 6, 2007, this Commission issued its tentative recommendation on whether to revise California's approach to the "forfeiture by wrongdoing" exception to the hearsay rule and invited public comment. As the Public Defender of Los Angeles County, I operate the largest public defenders office in the United States and welcome the opportunity to share my concerns regarding the Commission's tentative recommendations. Furthermore, I am responding on behalf of the California Public Defenders Association for which I serve as the Chairperson of the Legislative Committee.

The United States Supreme Court in Crawford v. Washington (2003) 541 U.S. 36 validated the concept of 'forfeiture by wrongdoing' but did not enunciate the legal boundaries of this legal concept. Prematurely drafting legislation in this uncertain legal climate, where legal scholars have more questions than answers, is an endeavor ripe with risk. At stake is the viability of the Confrontation Clause, a defendant's Sixth Amendment right to a fair trial, and ultimately, the truth seeking process of the criminal justice system. We urge this Commission to adopt a prudent and deliberative position and adopt Option #4, "leaving Evidence Code section 1350 alone until there is further judicial guidance" rather than adopt legislation in a vacuum thus endangering a criminal defendant's right to a fair trial. We concur in the Law Revision Commission's conclusion that Option #1 is inadvisable since there is no cognizable constitutional minimum which can be extracted from the existing body of case law. We oppose Options #2 and #3 as ill advised reactionary attempts to unnecessarily revise Evidence Code section 1350.

A primary question to be answered is whether there is a compelling need to change Evidence Code section 1350. The Commission provides no empirical evidence to answer this question. Any recommendation to revise California's existing laws to this degree should include empirical studies, not hypothetical situations, to justify reforms of this magnitude. The suggested reforms are premised on a faulty assumption which ignores the inherent unreliability of hearsay evidence and recklessly assumes the hearsay declarant's motives are pure and the hearsay statements being offered are trustworthy and accurate. These assumptions dangerously ignore a multitude of circumstances

EX 1

in which alleged complaining witnesses make false accusations against innocent defendants. The proposed reforms will adversely affect the ability of an innocent criminal defendant to test the reliability of the evidence offered against him or her in trial via meaningful cross-examination. Hearsay evidence is intrinsically inferior proof to live testimony and any attempt to liberalize its admissibility erodes the truth seeking process of the justice system. An unequivocal need for reform should be demonstrated before any new legislation is proposed.

The Commission correctly recognizes the futility of trying to predict how the United States Supreme Court will respond to the petitions for certiorari filed in two pivotal cases relating to issues on forfeiture by wrongdoing and the federal Confrontation Clause; People v. Giles (2007) 40 Cal.4th 833, *petition for cert. filed*, __U.S.L.W. __, (U.S. Aug. 20, 2007) (no. 07-6053), as well as 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). This uncertainty alone should cause the Committee to adopt Option #4.

In fact, a pervasive uncertainty surrounds the doctrine of forfeiture by wrongdoing and the existing body of case law leaves many issues unresolved. The analysis of Option #2 offers the false assurance that, "If California's statute on forfeiture by wrongdoing was modeled on the federal rule, there would be consistency at the federal and state level. Cases interpreting the federal rule could be used in interpreting the California provision." Specifically, the following are representative of some unresolved issues:

(a) whether the wrongdoing that caused the unavailability must be intended to cause the witness' unavailability;

(b) whether the forfeiture by wrongdoing doctrine applies when the witness colluded with a party to procure his unavailability;

(c) whether the forfeiture by wrongdoing doctrine applies when an alleged coconspirator, not the defendant, causes the unavailability;

(d) whether reflexive application of the forfeiture rule is proper, i.e. when the act alleged to support the forfeiture is the same act for which the accused is currently on trial;

(e) what is the appropriate burden of proof applicable to the doctrine of forfeiture by wrongdoing, i.e. a clear and convincing standard of proof or a preponderance standard;

(f) whether a separate evidentiary hearing outside the presence of the jury to hear the evidence supporting introduction of the statement under the federal rule is required,; and

(g) whether the unavailable witness's statement at issue can be used to establish the wrongdoing.

Additionally, Option #2 fails to provide procedural reciprocity and creates a potential Fourteenth Amendment violation by limiting the admissibility of statements to those “offered against a *party* who has engaged or acquiesced in wrongdoing.” The only parties to a criminal action are the prosecution (Penal Code Section 684) and the defendant (Penal Code Section 685). Witnesses who testify on behalf of the prosecution, such as police officers, are not parties. (People v. Punzalan (2003) 12 Cal.App.4th 1307).

If a police officer engaged in wrongdoing that caused the unavailability of a declarant whose statement the defense sought to introduce there would be no provision for the admissibility of that statement. Option #2 proposes legislation which could only be used against a criminal defendant and exclusively benefits the prosecutor. This lack of reciprocity is fatal under the Fourteenth Amendment. (Wardius v. Oregon, 412 U.S. 470.) Option #2, replacing section 1350 with one similar to the Federal Rule of Evidence 804(b)(6), is inadvisable because the proposed amendment replaces a sound statute with excessively broad amendments violating California’s Confrontation Clause and the 6th and 14th Amendments to the United States Constitution.

Option #3, which proposes broadening section 1350 to a limited extent, with the possibility of further revisions later, is a less radical but still unwarranted proposal. The Law Revision Commission concedes in its analysis that it “lacks sufficient information to determine whether such an amendment would represent an appropriate balance of the competing policy interests, which would serve California well in the long-term.” The decision whether to adopt the proposed amendment requires a choice between the fundamental principle that an accused criminal defendant has the right to confront and cross-examine the witnesses against him or her and the embryonic concept of forfeiture by wrongdoing.

The proposed expansion of the forfeiture by wrongdoing concept as drafted in Options #2 and #3 invites the admission of unreliable testimony and the conviction of innocent defendants. A criminal defendant’s Constitutional right to confront and cross-examine the veracity of a witness’s statement against him or her should not be sacrificed without further guidance from the United States Supreme Court.

By adopting Option #4 and allowing Evidence Code section 1350 to remain unchanged, the Commission will do what is best for California.

I appreciate the opportunity to comment on the Commission's tentative recommendations. If the Commission would like any additional information before making its final recommendations, I have appointed a liaison person. Please feel free to contact Deputy Public Defender Robin Bernstein-Lev at (213) 974-3009, or by email to Rbernstein-lev@lacopubdef.org.

Sincerely,



MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY;
CHAIRPERSON, LEGISLATIVE COMMITTEE
CALIFORNIA PUBLIC DEFENDERS
ASSOCIATION

MPJ:dp

To: Ms. Barbara Gaal, Chief Deputy Counsel
California Law Revision Commission
400 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

From: Deputy District Attorney Jeff Rubin
On Behalf of the California District Attorneys Association

Deputy City Attorney Eve F. Sheedy
Domestic Violence Legislative and Policy Advisor
Los Angeles City Attorney's Office

Re: Comment Upon the CLRC Tentative Recommendation on Definition of Unavailability
and Forfeiture By Wrongdoing Hearsay Exception

Date: December 7, 2007

Comments on Unavailability Due to Refusal to Testify

We strongly agree with the CLRC's recommendation regarding codification of a definition of unavailability to include a person who is "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." (See Recommendation, at p. 9, fn. 64 and p. 35.) We also like the proposed CLRC Comment to the enactment of this legislation (see Recommendation at p. 35).

Comments on Unavailability Due to Memory Loss

CDAAs have not had an opportunity to adequately vet the CLRC's recommendation regarding the codification of a definition of unavailability to include a person who is "present at the hearing but lacks memory of the subject matter of the declarant's statements." (See Recommendation, at p. 35.) However, we would like to raise some concerns.

First, we are concerned that the definition proposed by the CLRC is broader than authorized by the California case law purportedly supporting its adoption. In *People v. Alcalá* (1992) 4 Cal.4th 742, the court defined someone as unavailable due to a memory loss involving a "**complete** inability to recall relevant events at retrial[.]" (*Id.* at p. 778, emphasis added.) The witness in *Alcalá* had such a severe memory loss that she sought medical treatment for the problem. (*Id.* at p. 779.) In a subsequent opinion stemming from a habeas petition filed by the same defendant in *Alcalá*, the memory loss was described as "amnesia." (See *Alcalá v.*

Woodford (9th Cir. 2003) 334 F.3d 862, 881.) Indeed, the federal court stated that it would have been error to deny a defense request to have the witness examined regarding her mental infirmity. (*Ibid.*) Other cases have described such a memory loss as a “genuine” memory loss. (See *People v. Perez* (2000) 82 Cal.App.4th 760, 767; *People v. Sideris*, 2004 WL 1926040, *10 [unpublished].) The memory loss in *Alcala* was of a kind that easily fit into the definition of unavailability encompassed in Evidence Code section 240(a)(3) [“unable to . . . testify at the hearing because of then existing physical or mental illness or infirmity”].)

The loss of memory described in *Alcala* is a far cry from a person who simply “lacks memory” of the subject matter. Almost all witnesses have some loss of memory regarding past events and many witnesses feign memory loss regarding events. Witnesses who suffer less than total memory loss may end up being deemed unavailable for cross-examination.

Second, absent a more narrow definition of unavailability due to memory loss, courts are more likely to find a witness unavailable in circumstances where such a finding might run afoul of the Confrontation Clause. For example, in *People v. Perez* (2000) 82 Cal.App.4th 760, the court held that even though a witness *professed* total inability to recall the crime or statements to police, there was no Confrontation Clause violation because the witness was on stand and subject to cross-examination. (*Id.* at pp. 766-767.) It is at least a reasonable inference that if the witness in *Perez* had been declared unavailable and not been subjected to cross-examination, a Confrontation Clause violation would have occurred.

Third, a broad definition of memory loss would impact both the People’s ability and the defendant’s ability to draw out relevant information, refresh the witness’ memory, and challenge a witness’ claim of memory loss.

Accordingly, the CLRC might want to consider adding language to the proposed memory loss definition of unavailability to make it clear that unavailability on this ground is limited to the extraordinary situation where the memory loss is due to some sort of brain malfunction or physiological condition. At the very least, qualifying terms should be considered, i.e., “present at the hearing but *genuinely* lacks *any* memory of subject matter . . .,” or “present at the hearing but *genuinely* lacks *all* memory of subject matter . . .” or “present at the hearing but, *as a result of mental or physical impairment, genuinely* lacks *any* memory of the subject matter.”

General Comments on the Forfeiture By Wrongdoing Hearsay Exception

Although the CLRC has been operating under unusual time constraints in providing a tentative recommendation, it has done a commendable job of surveying the field of law regarding the forfeiture by wrongdoing doctrine. We appreciate also the good faith effort put forth by the CLRC to try and capture the various legal viewpoints on the issues raised by the forfeiture by wrongdoing hearsay exception. Finally, we recognize that *if* the petition for writ of certiorari filed in *Giles* or *Lopez* is granted, caution should be exercised in adopting a hearsay exception that incorporates aspects of the forfeiture by wrongdoing doctrine that will be subject to challenge in the United States Supreme Court

That being said, if the petition for certiorari is *denied* in *Giles*, legislative efforts should be directed at ensuring adoption of the most defensible and practical version of the forfeiture by wrongdoing hearsay exception - the version described in the Recommendation at p. 21 as a new provision on forfeiture by wrongdoing “that tracks the constitutional minimum” as is done in AB 268. If certiorari in *Giles* or *Lopez* is denied, waiting to resolve the problem on the basis that the High Court will eventually take up an issue they have already declined to review would be a mistake. (See <http://en.wikipedia.org/wiki/Certiorari> [approximately 7,500 petitions are presented each year; between 80 and 150 are granted].)

The primary oversight in the analysis is on how the forfeiture by wrongdoing exception plays out (and will play out) in real life criminal prosecutions. This oversight provides a partial explanation for the Recommendation’s rejection of the version of the forfeiture by wrongdoing hearsay exception proposed in AB 268.¹ We will refer to this version as the *Giles* approach since it largely codifies the California Supreme Court’s understanding, as expressed in that court’s decision in *People v. Giles* (2007) 40 Cal.4th 833, of how the forfeiture by wrongdoing doctrine works. The language used to codify this version is fairly summarized in footnote 145 on page 23 of the Recommendation.

To convey why the *Giles* approach should be adopted by the CLRC, this letter will first cover the problems the *Giles* approach was designed to address.

Prosecutions are prevented or hobbled when witnesses are eliminated or deterred from testifying. (See Hearsay, Confrontation, and Forfeiture by Wrongdoing: *Crawford v. Washington*, a Reassessment of the Confrontation Clause. Honorable Paul W. Grimm and Professor Jerome E. Deise, Jr., 35 U. Balt. L.F. 5, 44 (2004).) Surveys conducted by the National Youth Gang Center, which is financed by the federal Department of Justice, have found that 88 percent of urban prosecutors describe witness intimidation as a serious problem. (See <http://www.nytimes.com/2007/03/01/nyregion/01witness.html>.)

Talk to any prosecutor handling gang cases, homicides, domestic violence, etc., and he or she will tell you that witness intimidation occurs in the *majority* of their prosecutions. . (See also, Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing*

¹The minutes of the October 26th meeting explain that it is the longstanding practice of the Commission to avoid taking a position on pending legislation, and we respect that practice. However, it should not be overlooked that the language in option #1, which tracks *Giles*, also tracks AB 268. Importantly, the language of AB268, as proposed, is the result of a year’s worth of review, research, analysis, discussion and revision. The matter has been addressed by legislative counsel as well as by members of the Assembly Judiciary Committee Staff, members of the Senate Judiciary Staff, Assembly Member Calderon’s Staff, the California District Attorneys Association and the Los Angeles City Attorney’s Office. Accordingly, many legal experts, who share with the Commission the goal of enacting only constitutionally sound legislation that will benefit the people of the State of California have worked to develop appropriate statutory language. We feel that it is important for the Senate Judiciary Committee to be able to review the proposed language in the context of the Commission’s report. Since that analysis was not done, it leaves the Committee and the Sponsors to begin anew, with language that has not yet been vetted by those who have developed and worked to recommend legislative change in this area.

Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases, 11 Am. U.J. Gender Soc. Pol'y & L. 465, 489 n.8 (2003) [citing research showing that the most common reason victims in domestic violence cases refuse to testify is fear of retaliation].) A criminal defendant who eliminates a witness before the witness has a chance to testify at a preliminary examination can often count on the prosecution being dismissed. A working forfeiture by wrongdoing hearsay exception takes away some of the incentive to murder or dissuade the victim from testifying at the preliminary examination and will, without question, save the lives of some witnesses.

Victims of crimes, especially domestic violence victims, often do not report the threats or acts of violence perpetrated against them to the police. (See http://www.snbw.org/articles/unreported_violence.htm; see also, Tuerkheimer, Deborah, *Forfeiture in the Domestic Violence Realm*, 85 Texas Law Review 49 (2007) ["The dynamics of abuse put unique pressures on a battered woman to ally herself with the defendant, against the State."].) However, some reports do get made to the police and even if reports are not made to the police, the victims may report the threats or assaults to friends or relatives. When the victims are killed by the people who had previously assaulted or threatened them, the best, most probative, and relevant evidence of the identity or motive of the perpetrator can be these previous reports and yet they are inadmissible.

Evidence Code section 1350, which theoretically allows in statements against parties who caused a declarant's unavailability in certain circumstances, is utterly ineffective. A search of all the cases covered in the tens of thousands of appellate court decisions (published and unpublished) that have issued in the 22 years since the section was first enacted discloses but a single report of the section having been used to good effect. (See *People v. Zambrano* (2007) 41 Cal.4th 1082.) Considering the thousands of cases every year in which witnesses are dissuaded from testifying or killed after having given statements potentially implicating the perpetrator, the presence of section 1350 may well be worse than having no exception at all since its presence conveys the impression that California actually has a viable forfeiture by wrongdoing exception when, in fact, it exists in name only. Accordingly, a plan to retain section 1350 or mildly tinker with its language (respectively, options #4 and #3) does not meet or even address the need for legislation enabling California courts to utilize the forfeiture by wrongdoing exception.

Similarly, adopting the federal forfeiture by wrongdoing hearsay exception (option #2) does not adequately address the need for the hearsay exception as evidenced by the rarity of cases in which the federal hearsay exception is used. By requiring a showing of an intent to procure the unavailability of the witness, it becomes next to impossible to use a statement made by a person before the crime, for which the defendant is on trial, occurred. For example, take the case of a domestic violence victim who says to her friend that the defendant has been stalking her and threatening to kill her. The next day, the victim is murdered by the defendant. The defendant obviously did not kill the victim with the intent to prevent her from testifying - there was no case even pending against the defendant. The intent requirement would prevent the victim's statement from coming into evidence, even assuming the prosecution could overcome all other hurdles to admissibility. Therefore, the perpetrator would reap a benefit from his criminal conduct.

Moreover, even in a case where the dissuasion occurs after the crime for which the defendant is on trial is charged, the intent requirement can pose an insurmountable hurdle. For example, assume there is a case in which a defendant regularly and repeatedly abuses his wife. After some time, the victim calls the police and gives a statement. The defendant is charged and released, either by the court or by posting bail. After release, he physically abuses the victim again. The victim then refuses to testify. Even if the prosecution can show defendant physically abused the victim and that she is not available because of that abuse, how could the prosecution show it was more likely than not that he abused her to prevent her from testifying, especially in light of the expected defense argument that defendant repeatedly abuses the victim out of pure meanness (or to exert power and control) and this was just the latest example. (See generally, Amicus Curiae Brief of California Partnership to End Domestic Violence filed in *People v. Giles* (2007) 40 Cal.4th 833.) Simply put, most murders and acts of domestic violence are not committed with the intent to prevent the witness from testifying but nevertheless have the same exact effect of making the witness unavailable as crimes committed with the intent to prevent the witness from testifying. (See, Tuerkheimer, *supra*, [asserting that domestic violence victims are often uncooperative in prosecution due to the "abusive relationship, a relationship characterized by a continuing patten of power and control"].) The defendant still profits from his own wrong. (See generally *People v. Ruiz* 2005 WL 1670426, pp. *4-*7[unpublished decision noting "forfeiture is a logical extension of the equitable principle that no person should benefit from his own wrongful acts" citing to Civ.Code, § 3517].)

It should also be noted that the United States Supreme Court has already approved of the forfeiture of a defendant's constitutional right of confrontation based on defendant's wrongful conduct without requiring a showing of an intent to interfere with the judicial process. (See *Illinois v. Allen* (1970) 97 U.S. 337 [right to confront witnesses at trial may be lost by noisy, disorderly, and disruptive conduct; no mention of any requirement conduct be intended to disrupt court proceedings].)

Specific Comments on the Forfeiture By Wrongdoing Hearsay Exception Wherein We Respond to Some of the Straw Men That Have Been Posted as Sentries to Guard the Status Quo

"An out-of-court statement by a witness who is wrongfully prevented from testifying does not necessarily have any special assurance of reliability."
(*Recommendation, at p. 22.*)

As recognized in the Recommendation itself at p. 17, the doctrine of forfeiture by wrongdoing is not concerned with reliability. Although most lay folks have an intuitive understanding that a person should not be permitted to complain about an inequity brought about by the person's own wrongdoing, attorneys conditioned to view all hearsay exceptions through the prism of the trustworthiness test of *Ohio v. Roberts* (1980) 448 U.S. 56 sometimes have difficulty with the concept. However, when it comes to hearsay exceptions based on equitable concerns, the potential lack of reliability simply takes a backseat to the fact the law will not allow a person to capitalize on an unfairness the person has created. (See *People v. Parrish* (2007) 152

Cal.App.4th 263, 272-275 [discussing how hearsay exception allowing in remainder of statement when opponent puts in partial version of statement (Evid. Code, § 356) is based on fairness not reliability].)

Moreover, to the extent a court has concerns that the statement is simply “too” unreliable, a court retains the authority to exclude the statement under Evidence Code section 352. (Cf., *United States v. Aguiar* (2nd Cir. 1992) 975 F.2d 45, 47 [“we may assume that the admission of facially unreliable hearsay would raise a due process issue, although it is hard to imagine circumstances in which such evidence would survive Fed.R.Evid. 403's test of weighing probative value against prejudicial effect, an objection that is not waived by procuring a witness's absence”]; accord *United States v. Houlihan* (1st Cir. 1996) 92 F.3d 1271, 1282, fn. 6.)

“The circumstances [allowing in a hearsay statement under the forfeiture by wrongdoing doctrine] should be crafted to . . . ensure that wrongful conduct . . . was sufficiently serious to justify forfeiture of the constitutional right of confrontation.”
(Recommendation at p. 22.)

To the extent the above paragraph reflects a recommendation that the admission of a hearsay statement under the forfeiture by wrongdoing exception should turn on the “serious” nature of the conduct resulting in the declarant's absence, such a requirement is not constitutionally-based (see *Reynolds v. United States* (1878) 98 U.S. 45, 160-161 [finding doctrine applied where only act of defendant was to help the witness avoid service]) and, in any event, the requirement under the *Giles* approach that an intentional criminal act be committed on the part of the person opposing admission of the declaration of the unavailable witness adequately addresses any concern that the conduct engaged in be “serious.”

If California adopts a provision modeled on the federal rule, and the test of time shows it would be a better policy to narrow the rule in some respect, such a reform would be difficult to achieve in California due to the Truth-in-Evidence provision of the Victim's Bill of Rights. (Recommendation at p. 29.)

The above proposition is dubious. Many of the evidence code sections passed since the enactment of the Truth in Evidence provision of the Victim's Bill of Rights have restricted the admissibility of relevant evidence in a criminal case in some fashion (even while allowing in hitherto inadmissible evidence). (See e.g., Evid. Code, § 1109(e) [stating acts of domestic violence more than 10 years before the charged offense are presumptively inadmissible]; § 1108 [requiring disclosure in compliance with Penal Code section 1054.7 to introduce prior sexual offenses].)

“Acquiescence in Wrongdoing that Results in Declarant's Unavailability”
(Recommendation at p. 30.)

The Recommendation suggests that if the option expanding Evidence Code section 1350 is adopted (option #3), the language in section 1350 stating that “the declarant's unavailability

was knowingly caused by, aided by, or solicited by the party against whom the statement is offered” be maintained as opposed to adopting the language in the federal rule which applies when persons “acquiesce” in wrongdoing. The major problem with failing to include the term acquiesce (language which is included in AB 268) is that any version of the forfeiture by wrongdoing hearsay exception which does not include the term “acquiesce” or comparable language will fail to cover the very common situation of the incarcerated defendant whose cronies on the outside say to him, "Hey, we'll take care of your witness problem" followed by the defendant explicitly or implicitly approving the elimination of the witness by word, gesture, or even silence. Moreover, the term is used in the federal system and most other states that have adopted the exception, but we are not aware of any court that has found the term unconstitutionally vague nor any case indicating there have been problems in applying the term.

*“Circumstances Under Which the Hearsay Statement Was Made”
(Recommendation at p. 30.)*

The Recommendation suggests that if the option expanding Evidence Code section 1350 is adopted (option #3), the language in section 1350 requiring that “The statement was made under circumstances which indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion” may be worth retaining.” This language should not be retained for several reasons. First, it would end up excluding many statements that should be properly admitted under the rationale of the forfeiture by wrongdoing exception. Incorporating this language would end up subverting the very purpose behind the forfeiture by wrongdoing doctrine -preventing individuals from benefitting by their own elimination of a potential witness. Second, such language was originally included, in part, to ensure the statute comported with previous and now-repudiated Confrontation Clause jurisprudence. (See *Crawford v. Washington* (2004) 541 U.S. 36, 62 (emphasis added) ["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."].)

Respectfully submitted

Jeff Rubin
Alameda County Deputy District Attorney
on Behalf of the California District Attorneys Association

Eve F. Sheedy
Deputy City Attorney
Domestic Violence Legislative and Policy Advisor
On Behalf of the Los Angeles City Attorney's Office

**EMAIL FROM PROF. GERALD UELMEN,
SANTA CLARA UNIVERSITY SCHOOL OF LAW (11/5/07)**

Re: Comment on Draft of Tentative Recommendation Re Forfeiture by Wrongdoing

Dear Barbara:

Attached is a column I prepared for the December issue of the California Criminal Defense Reporter. It discusses the Commission's Draft of a Tentative Recommendation on the Hearsay Exception for Forfeiture by Wrongdoing. Please accept it as my comment on the proposed draft.

Many thanks,

Gerald F. Uelmen

Professor of Law, Santa Clara University School of Law
Executive Director, California Commission on the Fair Administration of Justice

Gerald F. Uelmen
December, 2007 Column

FORFEITURE OF THE CONSTITUTIONAL RIGHT OF CONFRONTATION BY WRONGDOING IN CALIFORNIA

In *People v. Giles*, 40 Cal.4th 833 (2007), the California Supreme Court construed the concept of forfeiture by wrongdoing to create the broadest conceivable exception to the constitutional right of confrontation. If a hearsay exception is available, virtually any relevant out of court statement by the victim of a homicide will be admissible, whether it is “testimonial” or not, since the homicide the defendant is accused of rendered the victim unavailable. While the defendant’s responsibility for the unavailability of the victim is a preliminary fact which must be established before the statement is admitted, the Court ruled that it only need be established by a preponderance of the evidence. Thus, the prosecution need only tender evidence to prove its case by a preponderance to open the gates for the victim’s statements to be admitted. Once they are admitted, in most cases a guilty verdict will be foreordained. A petition for *certiorari* was filed in *Giles* on August 20, 2007. It is likely to be granted, as state courts are divided in construing the breadth of the forfeiture by wrongdoing exception. If *certiorari* is granted, it is highly likely that the current majority on the U.S. Supreme Court will uphold the *Giles* decision, and rule that the forfeiture by wrongdoing exception to the constitutional right of confrontation applies even if there was no showing the defendant killed the victim with the intent of preventing her testimony.

Once the constitutional right of confrontation is defined in these terms, the only question remaining will be whether the corresponding exception to the hearsay rule will require proof that the defendant killed the victim with the intent of preventing her testimony. Currently, the federal rule does impose this requirement. Federal Rule of Evidence 804(b)(6) provides that a statement of a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable and the evidence is offered against a party who engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. The California exception for forfeiture by wrongdoing is even narrower. California Evidence Code Section 1350 not only requires clear and convincing evidence that the declarant’s unavailability was knowingly caused by, aided by, or solicited by the defendant for the purpose of

preventing his or her arrest or prosecution, it also requires the statement to be recorded or in a writing that is signed by the declarant and notarized. Circumstances to indicate trustworthiness and corroboration must also be shown.

It is highly unlikely that the protections of Section 1350 will survive if the *Giles* decision is upheld. In fact, the California Law Revision Commission has already released a Tentative Recommendation for comment, which lays out four alternative approaches:

- (1) Replace Section 1350 with a provision that tracks the constitutional minimum as laid out in *Giles*;
- (2) Replace Section 1350 with a provision similar to Federal Rule of Evidence 804(b)(6);
- (3) Broaden Section 1350 to apply in both civil and criminal cases, and to eliminate the requirement that a statement be signed and notarized.
- (4) Leave Section 1350 alone, at least until there is further judicial guidance.

The Law Revision Commission has already rejected option number one as not advisable at this time, but seeks comment with respect to the other three options. California criminal defense lawyers should respond to the request with thoughtful comments. In my opinion, the best option would be option number two, to replace Section 1350 with a provision similar to Federal Rule of Evidence 804(b)(6). This is our best hope of preserving the requirement that intent to procure the unavailability of the declarant as a witness must be shown. There are two persuasive arguments for this alternative. First, the constitutional minimum of the Right of Confrontation should not define the only circumstances where cross examination is necessary to test the credibility of testimony. Most hearsay exceptions, of course, exclude statements that are *not* “testimonial.” Constitutionally, a state could conceivably repeal the hearsay exception altogether, and admit *all* out of court statements except those which are testimonial. The hearsay rule still stands as the most important protection of the right to cross examine. The irony here is that the forfeiture by wrongdoing exception permits even testimonial statements to be admitted without cross examination. By definition, every statement that qualifies under current Section 1350 will be a testimonial statement. We need to return to the basic values that led to the widespread acceptance of the hearsay rule in the first place: the preference for testimony to be presented in court, where the witness can be sworn, and his or her demeanor observed while they are testifying. Cross examination provides an opportunity to probe for the bias

or exaggeration or motive to lie that are crucial to the jury's fact-finding role. These concerns are at their greatest in a homicide case, where the victim's prior statements may have been motivated by undisclosed bias or rancor.

Opponents of this alternative will ask, why should the forfeiture of the protections of the hearsay rule be construed more narrowly than the forfeiture of the constitutional protection of the Sixth Amendment right to confrontation? Aren't the same equitable considerations applicable? The defendant is available to tell his side of the story, but the victim is not, because the defendant has silenced her. This argument overlooks the limited applicability of the forfeiture exception in the constitutional context. Under *Crawford*, the protection of the Sixth Amendment right to confrontation is limited to testimonial statements. Therefore, the forfeiture by wrongdoing exception will only result in the admission of testimonial statements. A broad hearsay exception for forfeiture by wrongdoing, however, lets in lots of hearsay that is not even subject to Sixth Amendment protection. If the victim's "side" of the story relates to the circumstances of her homicide, a forfeiture rule modeled on the Federal Rule assures her side will be heard, since evidence that she was murdered to silence her will ordinarily be available. The rapist or robber who executes his victims, for example, has no grounds to complain when their dying declarations are admitted, even if they qualify as "testimonial" statements. Often, however, the forfeiture rule will be utilized to admit statements to establish prior acts, which do not relate to the circumstances of the homicide, but circumstantial factors such as motive. Here, application of a forfeiture rule in the absence of evidence of an intent to silence presents different equitable considerations. It is more akin to "punishing" the defendant for the crime of which he has not yet been convicted, by limiting his ability to defend himself through the tool of cross examination.

The second argument that offers strong support for option number two is the desirability of consistency. Most states have adopted the federal rules of evidence as their state evidence code, and already have Rule 804(b)(6) on the books. Efforts are already underway to bring California's Evidence Code in closer conformity with the Federal Rules of Evidence. There does not appear to be any reason for California to go its own way with a broader hearsay exception than that which is recognized in federal law and the law of most of our sister states. We may even see homicide cases that could be

prosecuted in federal court be brought into California state courts just to take advantage of a broader hearsay exception for victim's statements.

Option number three opens the door to legislative tinkering which could lead to a long, drawn-out period of uncertainty. This is an area where the trial courts need clear guidance. The Federal Rule has been widely construed and applied, and provides a relatively simple test for the courts to apply.

Option number four, simply doing nothing, has little to recommend it. The guidance to come from the courts will be limited to the dimensions of the constitutional right of confrontation, not the underlying wisdom of excluding hearsay and preserving the opportunity to cross examine. The underlying policies that support the exclusion of hearsay evidence are appropriate concerns for the legislature, and there is no compelling reason to wait until the constitutional litigation is fully played out before the legislature acts. The contours of *Crawford* have created a good deal of uncertainty, and are yet to be fully defined.

The excellent memoranda prepared by the Law Revision Commission addressing this issue, and some of the comments they have received so far, are all available on the Commission's website at www.clra.ca.gov. You can submit your own comments via email to commission@clrc.ca.gov. The Commission also recommends extending the definition of "unavailability" in Evidence Code Section 240 to conform with the Federal Rules of Evidence. That is a recommendation which I fully support. The oversight of not including a witness who refuses to testify despite a grant of immunity has led to some contorted court rulings treating the refusal as a "mental disability." *People v. Rojas*, 15 Cal.3d 540 (1975). That only works when the motivation for the refusal is fear. What if it is loyalty?