

First Supplement to Memorandum 2007-54

**Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing
(Initiative Measures in Preparation)**

In October, we alerted the Commission that an initiative measure on forfeiture by wrongdoing might be on the November 2008 ballot. We have since looked into this matter further and discovered that more than one such measure has been submitted to the Attorney General for preparation of a title and summary. Those measures are:

- (1) Safe Neighborhood Act (No. 07-0076). This measure was submitted on October 22, 2007. Substantive amendments were submitted on November 6, 2007.
- (2) Crime Victims Protection Act: Stop Gang and Street Crime (No. 07-0089). This measure was submitted on November 29, 2007.
- (3) Revised Safe Neighborhood Act (No. 07-0094). This measure was submitted on December 5, 2007. The proponents requested that it be accepted "as Version 2 of the initiative measure of the same name amended on November 6, 2007 (#07-0076)."

Each of these measures is signed by three proponents: State Senator George Runner, Jr., San Bernardino County Supervisor Gary Ovitt, and Mike Reynolds, the proponent of the Three Strikes Initiative. All three measures are long and include a lot of material, not just provisions relating to matters within the scope of the Commission's study.

As described by Senator Runner, the Safe Neighborhoods Act would do the following:

- Heighten penalties for accomplices. Amends 10-20-Life sentencing protocols to penalize not only the offenders who use firearms in the commission of certain felonies, but their accomplices as well.
- Provide Section 8 Housing protection. Enforces Section 8 Housing rules regarding guns, gangs and drugs, creating more public housing for truly needy Californians.
- Toughens laws for meth. Increases the penalties for those who use and sell methamphetamine to the same level as those for cocaine.

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.

- *Protect witness testimony. Authorizes admission or sworn statements by gang crime witnesses who have died or who are unavailable to testify at the time of prosecution because of intimidation.*
- Punish smugglers of prison contraband. Enhances penalties for individuals who provide contraband to gang members in prison.
- Create a statewide gang registry. Requires convicted gang offenders to register with local law enforcement each year for five years following conviction or their release from custody.
- Establish the “Use a gun and lose a car” law. When a gun is in a car and the registered owner is involved in a crime, the owner’s car can be impounded.
- Prohibit bail for illegal aliens charged with violent or gang crimes. Why should the courts grant illegal aliens, who are most likely to take flight, bail of any kind?
- Create the Early Intervention & Rehabilitation Commission. The commission will include nine members charged with evaluating, recommending and monitoring programs with emphasis on public accountability, disclosure and dispassionate assessments.
- Authorize \$250 million in targeted funding for police, sheriffs, district attorneys and probation officers. Assists local authorities with GPS tracking equipment to monitor gang members and high-risk felons. Prioritizes enforcement efforts to reduce firearm violence and other street crimes and programs designed to deter and rehabilitate.
- Stabilize funding for existing critical programs. Programs such as COPS will be made permanent and dependable so that law enforcement efforts can be maintained.

Runner, *Safe Neighborhoods Initiative Would Start Where Three-Strikes Left Off*, S.F. Daily J. 6 (Oct. 31, 2007) (emphasis added).

Each of the measures listed above would amend Evidence Code Section 240 to add the following new ground for finding that a declarant is “unavailable as a witness”:

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

....

(6) The declarant is present at the hearing and refuses to testify concerning the subject matter of the declarant’s statement despite an order from the court to do so.

....

Each of the measures would also add a new provision on forfeiture by wrongdoing to the Evidence Code, as follows:

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 intentional criminal 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 foundational hearing, is admissible at the foundational hearing. However, a finding that the elements of subdivision (a) have been met shall not be based solely on the unopposed 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 inadmissible unless it meets the requirements of an exception to the hearsay rule.

Such a provision would be similar to Option #1 in the tentative recommendation.

We will not know the fate of any of these initiative measures before the Commission's report is due on March 1, 2008. We will continue to monitor their status. Aside from mentioning them in the Commission's report, however, we do not think they have any implications for how the Commission should conduct its study.

Respectfully submitted,

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