Study K-600 January 15, 2008

Memorandum 2008-2

Forfeiture by Wrongdoing (Comments on Tentative Recommendation)

At the December meeting, the Commission considered comments on the tentative recommendation on forfeiture by wrongdoing. Since then, the Commission has received a comment from prosecutor Paul Vinegrad and a new comment from the Los Angeles City Attorney's Office ("LA City Attorney's Office") and the California District Attorneys Association ("CDAA"). Those comments and a case cited by Mr. Vinegrad are attached as follows:

Exhibit p.

- Eve Sheedy, Los Angeles City Attorney's Office, and Jeff Rubin, California District Attorneys Ass'n (1/7/08) 1
- Paul Vinegrad, Indio (12/30/07) 3
- *People v. Quitiquit*, 155 Cal. App. 4th 1, 65 Cal. Rptr. 3d 674 (2007) 4

Last Friday, the United States Supreme Court granted *certiorari* and set a briefing schedule in *People v. Giles*, 40 Cal. 4th 833, 152 P.3d 433, 55 Cal. Rptr. 3d 133 (2007), *cert. granted*, __ U.S.L.W. __ (U.S. Jan. 11, 2008) (No. 07-6053). The Court will consider the following issue:

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

We have been told that the Court probably will hear oral argument in April and decide the case by the end of June.

This memorandum begins by discussing the new comments. The memorandum then summarizes and analyzes the cumulative input on (1) the proposed reforms relating to the definition of "unavailability as a witness", and (2) each of the four options relating to forfeiture by wrongdoing as an exception to the hearsay rule.

The Commission's report on forfeiture by wrongdoing is due by March 1, 2008. **To meet that deadline, the Commission needs to give guidance on the four options and the reforms relating to unavailability at the January meeting.** The staff will then prepare a draft of a final recommendation for the Commission to consider, refine, and approve at the February meeting.

NEW COMMENTS

The two new comments are discussed below. Both of these comments were received before the United States Supreme Court granted *certiorari* in *Giles*.

Comments of Paul Vinegrad

Prosecutor Paul Vinegrad draws the Commission's attention to *People v. Quitiquit*, 155 Cal. App. 4th 1, 65 Cal. Rptr. 3d 674 (2007) (reproduced as Exhibit pp. 4-17), in which a woman died ten months after she got into an argument with her husband. She sought medical treatment a week after the argument and was diagnosed with an ear infection, but her condition progressively deteriorated thereafter, involving an unusual array of symptoms. About seven weeks after the argument, she reported for the first time that her husband had twisted her neck. He was eventually charged with her murder and convicted of voluntary manslaughter and inflicting great bodily injury on a spouse. Her statements about him twisting her neck were admitted at trial pursuant to Evidence Code Section 1370, which creates a hearsay exception for certain statements describing the infliction or a threat of physical injury.

On appeal, the key issue was whether the statements were properly admitted. The court of appeal concluded that the statements should have been excluded, because they were not made "at or near" the time of the injury and they were not made under circumstances indicating their trustworthiness. 155 Cal. App. 4th at 9-12 (Exhibit pp. 9-12). Among other things, the court of appeal noted that the victim

> started seeing doctors within a week after her purported injury and had numerous opportunities, as well as a motivation, to give her medical providers accurate information about circumstances that may have caused her injuries. [She] specifically denied that she had suffered any trauma to her neck until almost two months after the incident, a time period during which she would have had an opportunity to contrive a story or be coached by her children, at least one of whom was quite angry at [the defendant], to do so.

Id. at 12 (Exhibit p. 10). Because the statements were the centerpiece of the prosecution's case, the conviction was reversed. *Id.* at 13 (Exhibit pp. 12-13).

Justice Haller concurred. Unlike the majority, he thought that the victim's statements satisfied the requirements of Section 1370. Nonetheless, he said the statements should have been excluded, because they were testimonial and inadmissible under the Confrontation Clause. *Id.* at 14 (Haller, J., concurring) (Exhibit p. 14). In a footnote, he noted that the record appeared insufficient to decide as a matter of law whether the defendant had forfeited the right of confrontation. He explained that the issue of whether the defendant caused the victim's death was "hotly disputed." *Id.* at 14 n.1 (Exhibit p. 14 n.1).

Although the court of appeal in *Quitiquit* found insufficient evidence that the victim's statements were trustworthy, and the concurrence found that causation was "hotly disputed," Mr. Vinegrad says the case "shows why a forfeiture by wrongdoing hearsay exception (that does not include an intent to silence element) is needed to ensure justice to victims of violent crime." Exhibit p. 3.

Mr. Vinegrad believes that such an exception should be enacted without delay:

> It may be logical to wait for the United States Supreme Court to specify if the "equitable" constitutional doctrine of forfeiture by wrongdoing requires an intent to silence element. However, even if the Court grants cert. in *Giles* ..., a decision will not be forthcoming for many months. And it is not guaranteed that the Court's opinion will resolve the intent-to-silence issue. In the meantime, as *Quitiquit* shows, defendants who inflict violence upon innocent victims might escape justice because of the gaping "loophole" in California's Evidence Code.
>
> This state's highest court has spoken on this issue. Immediately formulating a hearsay exception based upon *Giles*, although not the "perfect world solution," would help ensure that justice is served. Delaying the matter until the Supreme Court hopefully speaks with greater clarity (than that provided in *Davis* and *Crawford*) would be a windfall to violent criminals.

Id.

Further Comments of CDAA and the LA City Attorney's Office

At the December meeting, the discussion focused primarily on what we have been referring to as Option #1, the proposal to replace Evidence Code Section 1350 (the existing hearsay exception for forfeiture by wrongdoing) with a much broader hearsay exception that tracks the constitutional minimum as enunciated

by the California Supreme Court in *Giles*. Such a provision could 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.

The Commission asked many questions about how a provision like this would apply in a murder case or an abuse case, or in a case involving an alleged gang member. The Commission was particularly interested in what type of corroboration would be required under what circumstances. The Commission was also particularly interested in whether the exception would apply in virtually all murder cases and abuse cases, and if not, why not. CLRC Minutes (Dec. 2007), pp. 13-14.

The Commission asked that CDAA and the LA City Attorney's Office provide further information on these points in writing. Those organizations have done so. See Exhibit pp. 1-2.

In their new comments, CDAA and the LA City Attorney's Office describe three hypothetical domestic violence cases, three hypothetical child abuse cases, and three hypothetical homicide cases. According to those organizations, in only one of the domestic violence hypotheticals, one of the child abuse hypotheticals, and one of the homicide hypotheticals would the victim's statement be admissible under a hearsay exception along the lines of Option #1. See *id.*

CDAA and the LA City Attorney's Office do not provide detailed explanations of why they think such a provision would be so interpreted. **The Commission may want to inquire about this at the upcoming meeting,** which a CDAA representative plans to attend. **We also encourage interested persons to submit written comments on these or other hypotheticals involving Option #1.**

CDAA and the LA City Attorney's Office do offer a number of reasons why they think Option #1 would not automatically admit every statement by an unavailable victim:

> First, the requirement that there be a showing by a preponderance of the evidence that the absence of the witness was the result of an act of wrongdoing by the defendant will often prevent the doctrine's use. Additionally, all statements offered must be supported by independent corroborating evidence. Moreover, the statement must not be subject to other objections that may keep the statement from being admitted, e.g., double hearsay, lack of personal knowledge, section 352, etc. Accordingly, there are both internal and external protections to insure that evidence pursuant to Option #1 is both relevant and competent. By enacting the language of Option #1, the Court is not forced into opening the floodgates of hearsay, but is instead provided with the opportunity to determine whether there is sufficient competent evidence that should be heard by the trier of fact to insure that a criminal defendant does not reap a benefit from his own criminal conduct.

Id. at 2.

Despite these assurances, the staff still thinks that Option #1 may render the protections of the Confrontation Clause inapplicable with respect to a victim's hearsay statements in most homicide cases and perhaps also in the vast majority of abuse cases.

By its very nature, a homicide case is one in which the victim is unavailable and there is at least some evidence linking the defendant to the victim's unavailability. A victim's hearsay statement might sometimes be the strongest evidence linking the defendant to the crime, but there will virtually always be other evidence as well, such as fingerprint or DNA evidence, or merely evidence of motive or opportunity. Otherwise, the crime would not be charged. (Homicide Example #1 at Exhibit p. 2 is a situation in which a crime probably would not be charged unless there was additional evidence.)

It thus seems likely that Option #1's requirement of independent corroborating evidence would be met in practically every homicide case. Likewise, using the weak preponderance of the evidence standard specified in

Option #1, the court probably will often find that a homicide defendant committed an intentional criminal act causing the victim's unavailability.

We therefore believe that Option #1 would have a big impact, not a minor effect, on the frequency of admitting a victim's statements in a homicide case. Whether that result is desirable depends on factors such as whether the victims' statements are reliable and can properly be evaluated without an opportunity for cross-examination, whether introduction of such statements deters future wrongdoing or is viewed as appropriate punishment for past misconduct, and whether perceptions of fairness will be undercut by permitting use of such evidence without an opportunity for cross-examination.

With regard to abuse cases, Prof. Fisher has warned that some prosecutors are beginning to argue that (1) domestic or child abuse by its very nature makes the victim afraid or otherwise unwilling to testify, and thus (2) forfeiture occurs whenever a judge finds at a pretrial hearing that the defendant committed the crime charged (presumably using the preponderance of the evidence standard). First Supplement to CLRC Memorandum 2007-41, Exhibit p. 23; see also Third Supplement to CLRC Memorandum 2007-41, Exhibit p. 2 (comments of Prof. Flanagan). From the examples given in their new comments, that does not appear to be the position taken by CDAA and the LA City Attorney's Office. See Exhibit pp. 1-2.

However, the text of Option #1 would not foreclose such an interpretation. Prof. Fisher suggests that "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." First Supplement to CLRC Memorandum 2007-41, Exhibit p. 23.

The staff agrees that **if a statute like Option #1 is enacted, it should specifically address this matter.** For instance, the statute could say that in an abuse case, proof of the act of abuse by a preponderance of the evidence in a pretrial hearing, by itself, is not sufficient to establish that the defendant caused the victim to be unavailable.

SUMMARY OF PREVIOUS INPUT AND ANALYSIS OF THE ISSUES

The tentative recommendation dealt with two topics: (1) the definition of "unavailable as a witness" in Evidence Code Section 240, and (2) forfeiture by

wrongdoing as an exception to the hearsay rule. The input on each topic is summarized below and the staff makes recommendations on how to proceed.

The Definition of "Unavailable as a Witness"

The tentative recommendation proposed two reforms of Section 240, one relating to a refusal to testify and the other relating to memory loss.

Refusal to Testify

The tentative recommendation proposed to amend Section 240 to expressly recognize that a witness who attends a hearing but refuses to testify on a subject, despite a court order to do so, is unavailable. This reform was recommended by Prof. Méndez. See Méndez, *California Evidence Code — Federal Rules of Evidence, Part I. Hearsay and Its Exceptions*, 37 U.S.F. L. Rev. 351, 357 (2003) (hereafter, "Méndez Hearsay Analysis"). The statute already expressly recognizes that a witness is unavailable when the court cannot compel the witness to attend by its process.

Prof. Gerald Uelmen (Santa Clara University School of Law), CDAA, and the LA City Attorney's Office all wrote in support of the proposed reform relating to a refusal to testify. See CLRC Memorandum 2007-54, Exhibit p. 5 (CDAA & LA City Attorney's Office), 16 (Uelmen). To date, the Commission has not received any negative comments on this reform. Based on this input, **the Commission should proceed with the proposed reform relating to a refusal to testify.**

Memory Loss

The tentative recommendation also proposed to amend Section 240 to expressly recognize that a person is "unavailable as a witness" if the person is "[p]resent at the hearing but lacks memory of the subject matter of the declarant's statement." This reform was also suggested by Prof. Méndez. See Méndez Hearsay Analysis at 357.

CDAA and the LA City Attorney's Office raised some concerns relating to the reform. See CLRC Memorandum 2007-54, Exhibit pp. 5-6. The staff has not yet researched these concerns, because it has been busy with other matters and because unavailability due to memory loss is not a topic that the Commission is required to cover in the report that is due by March 1, 2008. See CLRC Memorandum 2007-28, Exhibit p. 1. We therefore recommend that **the reform relating to memory loss be deleted from the report currently being prepared.** The Commission can study that matter further when time permits.

Forfeiture By Wrongdoing

The Commission has been exploring four possible approaches to forfeiture by wrongdoing as an exception to the hearsay rule:

- **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 as enunciated by the California Supreme Court in *Giles*.
- **Option #2.** Replace the existing provision with one similar to the federal rule.
- **Option #3.** Broaden the existing provision.
- **Option #4.** Leave the law alone for now.

The cumulative input on each of those options is summarized and analyzed below.

Option #1. Replace Section 1350 with a Statute that Tracks the Constitutional Minimum as Enumerated by the California Supreme Court

Option #1 would replace Section 1350 with a statute that tracks the constitutional minimum as enumerated by the California Supreme Court in *Giles*. Under this approach, it would no longer be necessary to show that the defendant intended to prevent the declarant from testifying. It would be enough to show, by a preponderance of the evidence, that the defendant engaged in an intentional criminal act that caused the declarant to be unavailable. In determining whether that requirement was met, a court could consider the proffered hearsay statement, but the statement could not be the sole evidence supporting the court's determination. The intentional criminal act causing the declarant's unavailability could either be the same act charged in the underlying case or a different act.

It is not clear whether this approach would be constitutional. In particular, lower courts are sharply divided on whether a showing of intent to silence the declarant is necessary before a defendant can constitutionally be deprived of the right of confrontation. That is why the United States Supreme Court granted *certiorari* in *Giles*.

Other constitutional issues are also unresolved, such as the requisite standard of proof, the extent to which a court can consider the proffered hearsay statement in determining whether the defendant forfeited the right of confrontation, and whether a court can base a finding of forfeiture on the same criminal act charged. See CLRC Memorandum 2007-41, p. 33. The United States Supreme Court

probably will give guidance on some, if not all, of these other points when it decides *Giles*.

Comments on Whether Option #1 is Premature

In the tentative recommendation, the Commission stated that Option #1 is inadvisable because the United States Supreme Court has not yet given guidance on key aspects of the constitutional minimum. At page 26, the Commission further stated that if the Court grants *certiorari* in *Giles*, "it would be unwise to act until the Court decides that case on its merits."

Many comments expressed similar sentiments. For example, Prof. Richard Friedman (University of Michigan Law School) said:

> The intent issue is an important one, the conflict among jurisdictions is clear, and so far as I am aware there are no procedural obstacles to the Court taking the [*Giles*] case. With a substantial chance that the Supreme Court will soon decide this matter, I do not believe it makes much sense for the California Legislature to revise the law on this matter now.

Second Supplement to CLRC Memorandum 2007-41, Exhibit p. 4.

Prof. James Flanagan (University of South Carolina School of Law) "concur[red] 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. Prof. Daniel Capra (Fordham University School of Law) expressed the same view. See CLRC Memorandum 2007-41, p. 32. Likewise, the California Public Defenders Association ("CPDA") and the Los Angeles Public Defender's Office ("LA Public Defender's Office") concurred in the "conclusion that Option #1 is inadvisable since there is no cognizable constitutional minimum which can be extracted from the existing body of case law." CLRC Memorandum 2007-54, Exhibit p. 1. Even CDAA and the LA City Attorney's Office "recognize[d] that *if* the petition for writ of *certiorari* filed in *Giles* 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." *Id*. at Exhibit p. 6 (emphasis in original). Only Paul Vinegrad advocated proceeding with Option #1 regardless of whether the United States Supreme Court granted *certiorari*. See Exhibit p. 3.

Comments on the Merits of Option #1

Several comments addressed the merits of Option #1. Like Mr. Vinegrad, CDAA and the LA City Attorney's Office consider it the best approach from a policy standpoint. They believe it would "tak[e] 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." CLRC Memorandum 2007-54, Exhibit p. 8. Prof. Friedman also thinks the administration of justice would be improved by finding forfeiture whenever "the defendant's wrongful conduct — intimidation as well as homicide or kidnapping — rendered the witness unavailable to testify at trial, whether or not this prospect motivated the conduct." Second Supplement to CLRC Memorandum 2007-41, Exhibit p. 4.

In contrast, CPDA and the LA Public Defender's Office oppose Option #1. They warn that not all evidence is reliable and the approach would "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." CLRC Memorandum 2007-54, Exhibit pp. 1-2. In a similar vein, Prof. Uelmen cautions that the approach would undercut the presumption of innocence by permitting forfeiture and in effect guilt to be established by a mere preponderance of the evidence. *Id*. at Exhibit p. 13. Prof. Capra reported the existence of similar concern among a group of federal district court judges. Second Supplement to CLRC Memorandum 2007-41, Exhibit p. 3.

Prof. Méndez noted that evidence admitted under a hearsay exception for forfeiture by wrongdoing "may be bereft of any circumstantial guarantees of trustworthiness." First Supplement to CLRC Memorandum 2007-41, Exhibit p. 13. He suggested that if a provision like Option #1 were adopted, "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." *Id.* at 14. Prof. Capra disagreed with that idea, warning that "including a reliability requirement in a statutory forfeiture rule is self-defeating." Second Supplement to CLRC Memorandum 2007-41, Exhibit p. 3.

Prof. Méndez also emphasized the importance of the constitutional right of confrontation, and said that "the Legislature should consider with care the circumstances when a party's 'wrongdoing' should result in the forfeiture of this important right." First Supplement to CLRC Memorandum 2007-41, Exhibit p.

13. In particular, he favorably discussed the intent-to-silence limitation and suggested that even if the United States Supreme Court does not impose such a limitation as a matter of constitutional law, the California Legislature should consider doing so. *Id.* at Exhibit pp. 15-16. He also questioned whether "California should depart from its long-standing and unbroken practice of insisting on the use of admissible evidence in resolving foundational fact disputes," as is contemplated under Option #1. *Id.* at Exhibit p. 17.

Prof. Fisher made different points. He noted the possibility of differentiating between a living and a dead declarant, requiring proof of intent-to-silence only if the declarant is living. *Id.* at Exhibit p. 22. He pointed out that if Option #1 were adopted, it might be useful to clarify whether the causation requirement would be satisfied if the declarant's unavailability was an unforeseeable result of the defendant's conduct. *Id.* at Exhibit p. 23. He also raised concerns about application of that approach in murder and abuse cases, as previously discussed. *Id.*

Prof. Flanagan seconded the concerns about murder and abuse cases. Third Supplement to CLRC Memorandum 2007-41, Exhibit p. 2. In a law review article written before the Commission began this study, he explained at length why it would be bad policy to eliminate the intent-to-silence requirement, as would be done by Option #1. See Flanagan, *Confrontation, Equity, and the Misnamed Exception for "Forfeiture" by Wrongdoing*, 14 Wm. & Mary Bill Rts. J. 1193, 1248-49 (2006).

Analysis

Given the grant of *certiorari* in *Giles*, **the staff continues to believe that Option #1 would be premature.** Whether Option #1 would be advisable if it is found to be constitutional is obviously debatable; the staff is not as yet persuaded that it would be the best policy choice for California.

A decision on at least some of the unresolved constitutional issues will be forthcoming by July. Once such a decision is available, it will be easier than at present to assess which aspects of Option #1 are constitutional and which are not. The Court's opinion, any other opinions issued, the briefs, and new scholarly commentary may also shed light on the policy implications and potential effects of Option #1.

We believe it would be unwise for the Legislature to proceed with Option #1 or a variant of it without taking the time to carefully review, consider, and

allow interested persons an opportunity to comment on, that soon-to-be generated material. As Prof. Méndez pointed out, the Legislature is not compelled to follow the constitutional minimum. See First Supplement to CLRC Memorandum 2007-41, Exhibit p. 16.

Option #2. Replace Section 1350 with a Provision Similar to the Federal Rule

Option #2 would replace Section 1350 with a provision similar to the federal hearsay exception for forfeiture by wrongdoing (Fed. R. Evid. 804(b)(6)). Such a provision could be drafted 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.
>
> **Comment.** Section 1350 supersedes former Section 1350 (1985 Cal. Stat. ch. 783, § 1). The new provision is drawn from Federal Rule of Evidence 804(b)(6) and Uniform Rule of Evidence 804(b)(5).
> See Section 240 ("unavailable as a witness").

As explained at pages 26-28 of the tentative recommendation, a provision like this probably would be constitutional. The tentative recommendation also points out that a provision modeled on the federal rule would:

- Provide a much broader forfeiture exception to the hearsay rule than Section 1350.
- Help to address concerns that prosecution of some criminal cases has been impeded by *Crawford's* limitations on admissibility of testimonial statements.
- Likely generate concerns about introduction of unreliable evidence that currently would be inadmissible.
- Apply in both civil and criminal cases, thereby discouraging witness tampering in both types of cases.
- Be more evenhanded than Section 1350, because it could be invoked by the defendant, not just by the prosecution.
- Result in consistency at the federal and state level.

Comments on Option #2

Prof. Capra supports the idea of "replicating Rule 804b6," because there "is virtue in having consistency at the federal and state level." See CLRC Memorandum 2007-41, p. 37. Prof. Méndez also seems to like the federal rule, at

least better than Option #1, although he does not directly say so. See First Supplement to CLRC Memorandum 2007-41, Exhibit pp. 13-16.

Prof. Uelmen strongly supports Option #2. See CLRC Memorandum 2007-54, Exhibit pp. 14-15. Like Prof. Capra, he mentions that consistency is desirable. *Id.* at Exhibit p. 14. He also stresses that Option #2 would be preferable to Option #1 because it would better serve the values underlying the hearsay rule: the preference for testimony given under oath, subject to cross-examination, and in a setting that permits the factfinder to observe the witness' demeanor. *Id.*

CDAA and LA City Attorney's Office oppose Option #2 on the ground that it 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." *Id.* at Exhibit p. 8. CPDA and the LA Public Defender's Office also oppose Option #2, but on the opposite ground. They view it as an "ill advised reactionary attemp[t] to unnecessarily revise Evidence Code section 1350." *Id.* at Exhibit pp. 1, 2-3. In addition, they dispute the idea that Option #2 would result in consistency at the federal and state level. *Id.* at Exhibit p. 2. They also maintain that Option #2 exclusively benefits the prosecutor and thus unconstitutionally fails to provide procedural reciprocity to a criminal defendant. *Id.* at Exhibit p. 3.

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 problematic, "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.* Prof. Méndez has also expressed concern about use of the term "acquiesce." Email from M. Méndez to B. Gaal (11/30/07). However, CDAA and the LA City Attorney's Office see no problem with use of that term. CLRC Memorandum 2007-54, Exhibit p. 11.

Analysis

Option #2 would preserve the intent-to-silence requirement and afford the benefits of uniformity with federal law and the law of other states. It may face a tough reception in the Legislature, however, due to the combined opposition of CDAA, CPDA, the LA City Attorney's Office, and the LA Public Defender's Office.

If the Commission is convinced at this time that Option #2 is the best long-term solution for the state, it should say so in its report. Under that circumstance, it would not be necessary to wait to see what the United States Supreme Court does in *Giles*, because it is unlikely that the Court's decision will indicate that Option #2 is unconstitutional in any respect (except possibly with regard to the standard of proof, which could readily be adjusted if needed).

If the Commission is undecided about Option #2 and believes it would be helpful to wait until *Giles* is resolved before deciding how to proceed, again it should say so in its report. The Commission need not endorse a particular option as a long-term solution if it feels that the best approach would be for the Legislature to await the Court's decision in *Giles* and then review the situation.

Finally, if the Commission believes that Option #2 would be a bad idea no matter what the Court decides in *Giles*, it should say so in its report. For instance, this would be the appropriate course if the Commission agrees with the defense bar that the existing hearsay exception for forfeiture by wrongdoing (Section 1350) represents the optimum balance of the competing considerations and Option #2 would unwisely disrupt that balance by allowing admission of too much unreliable evidence.

Option #3. Broaden Section 1350

Option #3 would be to broaden Section 1350, the existing narrow hearsay exception for forfeiture by wrongdoing. Because Section 1350 has many requirements, that could be done in a variety of different ways. The draft amendment in the tentative recommendation would revise the statute to: (1) apply in any civil or criminal case, not just a case charging a serious felony, (2) expand the types of statements that are admissible, and (3) make various other changes. For further detail on how the statute could be amended, see pages 29-33 and 38-40 of the tentative recommendation.

Comments on Option #3

Option #3 received no clear support. Prof. Flanagan's comments came closest to this, but he only said that "Section 1350 is a carefully drafted and limited expression of the forfeiture by wrongdoing rule" and "[t]he drafters of any amendments should carefully choose any language that broadens the statute's application ...." Third Supplement to CLRC Memorandum 2007-41, Exhibit p. 2. He also made clear that if the Legislature revises Section 1350, it should seriously consider retaining the protections of subdivisions (a)(2)-(4). *Id.*

Prof. Uelmen opposes Option #3 because it "opens the door to legislative tinkering which could lead to a long, drawn-out period of uncertainty." CLRC Memorandum 2007-54, Exhibit p. 14. CPDA and the LA Public Defender's Office also oppose Option #3, because it would "invit[e] the admission of unreliable testimony and the conviction of innocent defendants." *Id.* at Exhibit p. 3. CDAA and the LA City Attorney's Office likewise oppose Option #3, but because it is "utterly ineffective" and would not "meet or even address the need for legislation enabling California courts to utilize the forfeiture by wrongdoing exception." *Id.* at Exhibit p. 8.

Analysis

In light of the opposition and the lack of support, Option #3 does not seem politically viable. **The Commission should not recommend this option unless it is firmly convinced that the option represents the best policy and none of the other options are close to being as sound from a policy standpoint.**

Option #4. Leave Section 1350 Alone For Now

Option #4 would leave Section 1350 alone for now. This option really amounts to two alternatives: (a) Section 1350 could left alone until there is further judicial guidance (e.g., a decision from the United States Supreme Court in *Giles*), or (b) the statute could be left alone indefinitely.

Comments on Option #4

CPDA and the LA Public Defenders Office support Option #4. They are concerned that expanding the hearsay exception for forfeiture by wrongdoing would result in introduction of unreliable evidence that may endanger a criminal defendant's right to a fair trial. CLRC Memorandum 2007-54, Exhibit p. 1. From their comments, it is not clear whether they would be amenable to revising Section 1350 in any respect after the Court issues its decision in *Giles*.

Prof. Uelmen opposes Option #4 because he believes the Legislature already has sufficient information to determine that Option #2 is the best choice. See *id.* at Exhibit p. 16.

When they submitted their comments in December, CDAA and the LA City Attorney's Office opposed Option #4 for the same reasons that they opposed Option #3: It would not effectively deter wrongdoing that causes a witness to be unavailable to testify. See *id.* at Exhibit p. 8. Now that the United States Supreme Court has granted *certiorari* in *Giles*, however, their position might have changed.

It is clear that further judicial guidance will be available sooner rather than later; awaiting that guidance before enacting legislation will not involve as much delay as initially seemed likely. **When it meets, the Commission should ask CDAA and the LA City Attorney's Office about their current position on Option #4.**

Analysis

California has the biggest court system in the world. The Legislature should not make a major change in that system without first carefully considering the potential consequences of that change. Due to the Truth-in-Evidence provision of the Victims' Bill of Rights (Cal. Const. art. I, § 28(d)), caution is especially warranted with respect to a reform that would increase the admissibility of relevant evidence in a criminal case. If such a reform is enacted and later proves unwise, it could only be undone by a vote of the people or a statute "enacted by a two-thirds vote of the membership in each house of the Legislature ...." *Id.*

In light of these considerations, as well as the prospect of new guidance from the United States Supreme Court by mid-summer, **the best course may be to advise the Legislature to wait for the *Giles* decision before deciding how to handle forfeiture by wrongdoing as an exception to the hearsay rule.** The Commission could submit a report that discusses the various options and factors for the Legislature to consider, without taking a position on which approach to forfeiture by wrongdoing is preferable on a long-term basis.

NEXT STEP

The Commission needs to give general direction on the content of its report. The staff will then prepare a draft of a final recommendation, which the Commission can refine and approve at the February meeting. We will try to release that draft well before the meeting, to afford sufficient opportunity for interested persons to review and comment on the draft.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

To: Ms. Barbara Gaal
From: Deputy City Attorney Eve Sheedy
On Behalf of the Los Angeles City Attorney's Office
Deputy District Attorney Jeff Rubin
On Behalf of the California District Attorney's Association
Re: CLRC Recommendations regarding a Forfeiture by Wrongdoing Hearsay Exception
Date: January 7, 2008

At the CLRC hearing on December 14, 2007 in Burbank, the Committee requested further comment in the form of examples wherein the proposed forfeiture by wrongdoing hearsay exception cited in the Tentative Recommendations as Option #1 would apply and would not apply in the context of Domestic Violence, Child Abuse and Homicide cases. Following are those examples.

Application of Option #1 in the context of a Domestic Violence case:

Example No. 1: A Victim gives a statement to the police that she was physically abused by the defendant. The Victim fails to appear in court in response to a subpoena at the trial on the domestic violence charges. There is no evidence provided as to why the Victim failed to show up. In this instance, Option #1 would NOT apply.

Example No. 2: A Victim gives a statement to the police that she was physically abused by the defendant. The Victim fails to appear in court in response to a subpoena at the trial on the domestic violence charges. The Prosecutor telephones the Victim. The Victim states she does not want to testify because her initial report was false. No other evidence is introduced explaining why the Victim failed to appear in court. In this instance, Option #1 would NOT apply.

Example No. 3: A Victim gives a statement to the police that she was physically abused by the defendant. The Victim fails to appear in court in response to a subpoena at the trial on the domestic violence charges. The Prosecutor introduces a taped phone call that defendant made from jail telling the Victim that if she showed up to testify, bad things would happen to her. In this instance, Option #1 WOULD apply.

Application of Option #1 in the context of a Child Abuse case:

Example No. 1: A child gives statement to the police claiming that the defendant physically abused or assaulted her. The child refuses to testify at trial on the child abuse charges. No evidence is provided explaining why the child is refusing to testify. In this instance, Option #1 would NOT apply.

Example No. 2: A child gives a statement to the police claiming that defendant physically abused or assaulted her. The child refuses to appear to testify. The Prosecutor calls the person having custody of the child. That person says the

child does not want to testify against the parent because she does not want to get the offending parent in trouble. No other evidence is presented. In this instance, Option #1 would NOT apply.

Example No. 3: A child gives a statement to police claiming defendant physically abused or assaulted her. The child refuses to appear to testify. The Prosecutor introduces testimony from the child's caretaker that at the time of the abuse, the defendant threatened to kill the child if she ever told anyone about the event. The Prosecutor introduces testimony from the child's caretaker that child is too frightened to testify because of defendant's prior threats. In this instance, Option #1 WOULD probably apply.

Application of Option #1 in the context of a Homicide case:

Example No. 1: A Victim tells her friend that she has asked the defendant for a divorce. The Victim turns up missing. Defendant is found with the Victim's credit card in his possession. No other evidence is presented by the Prosecution. In this instance, Option #1 would NOT apply.

Example No. 2: A Victim tells her friend that the defendant is planning to kill her. The Victim turns up missing. The Prosecutor presents evidence that the Victim's blood is found in defendant's car, and that the defendant was the last person seen with Victim. In this instance, Option #1 would NOT apply unless the Victim also told the friend how she knew defendant was planning to kill her.

Example No. 3: A Victim tells her friend that the defendant threatened to kill her. The Victim turns up missing. The Prosecutor presents evidence that the Victim's blood is found in defendant's car, and that the defendant was the last person seen with Victim. In this instance, Option #1 WOULD apply.

The Committee voiced concern that the doctrine of forfeiture by wrongdoing, as set forth in Option #1, would be applicable in almost all, if not all matters in which the Victim was not present to testify. We disagree. First, the requirement that there be a showing by a preponderance of the evidence that the absence of the witness was the result of an act of wrongdoing by the defendant will often prevent the doctrine's use. Additionally, all statements offered must be supported by independent corroborating evidence. Moreover, the statement made must not be subject to other objections that may keep the statement from being admitted, e.g., double hearsay, lack of personal knowledge, section 352, etc. Accordingly, there are both internal and external protections to insure that evidence admitted pursuant to Option #1 is both relevant and competent. By enacting the language of Option #1, the Court is not forced into opening the floodgates of hearsay, but is instead provided with the opportunity to determine whether there is sufficient, competent evidence that should be heard by the trier of fact to insure that a criminal defendant does not reap a benefit from his own criminal conduct.

EMAIL FROM PAUL VINEGRAD (12/30/07)

Re: Forfeiture by Wrongdoing Hearsay Exception

Please read the case of People v. Quitiquit (2007) 155 Cal.App.4th 1, review denied (December 19, 2007).

This case shows why a forfeiture by wrongdoing hearsay exception (that does not include an intent to silence element) is needed to ensure justice to victims of violent crime.

It may be logical to wait for the United States Supreme Court to specify if the "equitable" constitutional doctrine of forfeiture by wrongdoing requires an intent to silence element. However, even if the Court grants cert. in Giles (a conference is scheduled for January 11, 2008), a decision will not be forthcoming for many months. And it is not guaranteed that the Court's opinion will resolve the intent-to-silence issue. In the meantime, as Quitiquit shows, defendants who inflict violence upon innocent victims might escape justice because of the gaping "loophole" in California's Evidence Code.

This state's highest court has spoken on this issue. Immediately formulating a hearsay exception based upon Giles, although not the "perfect world solution," would help ensure that justice is served. Delaying the matter until the Supreme Court hopefully speaks with greater clarity (than that provided in Davis and Crawford) would be a windfall to violent criminals.

I would be glad to offer my services in the drafting of a forfeiture by wrongdoing hearsay exception that ensures (in an uncertain legal world) constitutional viability.

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CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL PEDRO QUITIQUIT, Defendant and Appellant.	D050385 (Super. Ct. No. E040315)

APPEAL from a judgment of the Superior Court of Riverside County, James S. Hawkins, Judge. Reversed.

Catherine White under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Ronald A. Jakob and David Delgado-Rucci, Deputy Attorneys General, for Plaintiff and Respondent.

The critical issue on this appeal is whether the trial court erred in admitting evidence of a declarant's statements to her doctor and a police officer that the defendant had caused her neck injury seven weeks earlier, pursuant to the "physical injury" exception to the hearsay rule for statements made "at or near" the time of the injury. (Evid. Code, § 1370, subd. (a)(3).) (All further statutory references are to the Evidence Code except as otherwise noted.) We conclude that the statements were not made at or near the time of the injury and that the statements to the officer were not made under circumstances indicating their trustworthiness and thus none of the statements qualified for admission pursuant to section 1370. We reverse the judgment on this basis without reaching (1) the alternative issue of whether the admission of the declarant's statements to

the police officer also violated the defendant's confrontation rights as described in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), (2) the related issue of whether the defendant is precluded from asserting his confrontation rights pursuant to the forfeiture by wrongdoing doctrine (see *People v. Giles* (2007) 40 Cal.4th 833, 840-854), and (3) the defendant's contention that the court's imposition of an upper term sentence violated his constitutional rights to a jury trial under *Cunningham v. California* (2007) 549 U.S. __ (127 S.Ct. 856).

FACTUAL SUMMARY

In early 2002, the defendant, Michael Pedro Quitiquit, and his wife of 15 years, Martina Villanueva, were separated, although Quitiquit periodically stayed with Villanueva in her mobile home in Indio. (All further designated dates are in 2002 except as otherwise noted.) Villanueva's son, Anthony Jara (then age 31), and three of the couple's children, Martin (age 22), Lorraine Julie (age 17; referred to by the parties, and herein, as Julie), and Tina (age 16), lived with Villanueva at that time.

Late in the evening of March 6, while Villanueva and Quitiquit were in her bedroom, they got into an argument. A week later, Villanueva went to the doctor, complaining of various symptoms, including numbness in her right cheek, ear pain, and weakness and numbness on the left side of her body, which she said she had been experiencing for one to two weeks; she was ultimately diagnosed with, and prescribed antibiotics for, an ear infection.

Villanueva experienced increasing numbness, as well as additional symptoms, over the next week and again consulted with her doctor. Villanueva told the attending nurse practitioner that she had "no known injury to [her] neck," although an X-ray of her cervical (upper) spine taken the next day revealed that she had a degenerative condition in the back of her neck that could have been caused by "prior injuries . . . or arthritis."

Because of increasing physical difficulties, Villanueva stopped working as a shoe department manager at the end of March and went back to see her doctor again in early April. During a visit on April 6, Villanueva indicated that she had been experiencing physical problems for three to four weeks. An MRI of Villanueva's head and cervical spine showed that she had degenerative disk disease, a small disk herniation that could have been caused by an injury and swelling in her upper spine.

On April 14, after an argument between Quitiquit and Julie relating to Villanueva's deteriorating condition, Julie and two of her sisters took Villanueva to the hospital. Villanueva was treated in the emergency room and then admitted to the hospital by Internist Richard Kyaw. An MRI and X-ray of her spine showed "extensive signal alteration" of her cervical and thoracic spine, possibly as a result of traumatic injury, although she reported that she had no "prior history of . . . trauma." She was prescribed high-dose steroids to reduce the inflammation of her spinal cord.

On April 24, after having been at the hospital for approximately nine days, Villanueva reported for the first time that Quitiquit had twisted her neck. Hospital staff promptly notified the police of Villanueva's accusations and the next day, Indio Police

Officer Jeremy Hellawell telephoned Villanueva to investigate her statements. During the call, Villanueva told him that during an argument on March 6, her husband approached her as she laid on her bed, grabbed her head with both hands (one under her chin and the other behind her head) and pulled her off of the bed while twisting her neck.

Based on the nature of Villanueva's statements, Indio Police Officer Hellawell went with a second officer to the hospital to interview Villanueva in person. Although Villanueva was sleepy and "a little bit out of it," she reiterated what she had told Officer Hallowell on the phone and described the symptoms she had experienced since the incident. Villanueva made clear, however, that she was not interested in pressing charges against Quitiquit for the abuse.

The officers also interviewed Julie, who was at the hospital visiting Villanueva. She appeared to be very angry after hearing Villanueva's statements and told Officer Hellawell that although she had not seen anything on the night of the incident, she had heard her mom yell out her father's name during the argument. After completing the interview with Julie, Officer Hellawell issued an all-points report calling for Quitiquit's arrest.

Villanueva was discharged from the hospital on April 25 (the same day that Officer Hellawell interviewed her) despite the fact that there had been no improvement in her condition. The hospital doctors were unable to reach a consensus as to the cause of Villanueva's problems and no official specific diagnosis was made, although the general diagnosis was that she had symptoms from an acute cervical spine injury or condition, accompanied by an infection.

Villanueva's physical problems continued to worsen and by July 2, she had permanent partial paralysis of her arms and legs. Although Villanueva had some range of movement, she could not walk on her own; in addition, she had lost the ability to control her bladder and bowels and was suffering from neuropathic pain, all as a result of an incomplete spinal cord injury in her cervical (upper) spine. Villanueva underwent neck surgery in September to permit a biopsy of her spinal cord and had "significant recovery" of her left arm strength and regained some mobility as a result of rehabilitation efforts, although her partial paralysis, loss of control of her bladder and bowels, and pain remained; she was also receiving treatment for depression.

The police arrested Quitiquit on a charge of inflicting violence on Villanueva. However, after being rehospitalized, Villanueva died in late December. Forensic pathologist, Mark Scott McCormick, performed an autopsy of her body; his review revealed that Villanueva had numerous complications as a result of quadriplegia, including chronic inflammation of her abdomen, pneumonia, a sacral decubitus ulcer (a breakdown of the skin at the tailbone), swelling of her brain and a blood infection, as well as an area of degeneration in her spinal cord.

The prosecution filed a new felony complaint against Quitiquit for murder as well as spousal abuse. Prior to trial on the charges, Quitiquit moved in limine to exclude evidence of Villanueva's statements to Dr. Kyaw and Officer Hellawell on the basis that the statements were hearsay and that their admission would violate his Sixth Amendment confrontation clause rights under *Crawford, supra*, 541 U.S. 36. The prosecutor

countered that all the statements were admissible under the section 1370 exception to the hearsay rule and that the admission of Villanueva's statements to Officer Hellawell would not violate Quitiquit's confrontation clause rights because those statements were made at a pre-investigation stage and were thus not testimonial in accordance with *Crawford*. After extensive argument, the trial court agreed that the statements were admissible and denied Quitiquit's motion in limine.

At trial, the prosecution's theory was that Quitiquit caused Villanueva's death by violently twisting her neck during the March 6 argument. In support of this theory, the prosecutor introduced the evidence of Villanueva's statements to Dr. Kyaw and Officer Hellawell, as well as testimony by Anthony and Julie about the March 6 argument.

Anthony testified that as he was falling asleep, he heard Quitiquit getting angry and his mother respond by saying something like "Go ahead. Do it." He then heard Quitiquit "grunting" and Villanueva "gasp" for air and say "stop" in a frightened tone of voice. Anthony called out to Villanueva to see if she was all right and Villanueva responded in a normal tone of voice that she was "fine." Anthony heard his stepfather leave shortly thereafter. Although Anthony did not see his mother the next morning, when he returned to the house a few days later, he saw Villanueva rubbing her neck as if she was in pain. Villanueva explained away the pain by telling him that she had "slept wrong."

Julie testified that, although her father was not home when she went to bed on March 6, she later awoke when she heard her mother crying and yelling out his name. Despite her earlier statements to Officer Hellawell that she did not see anything that happened during the argument that night, Julie testified that she went to check on Villanueva and saw Quitiquit standing over her mother, who was lying on her bed. She testified that Quitiquit angrily told her to go back to bed and she complied and that she heard her father leave the home 10 to 15 minutes later. Julie testified that the next morning, she noticed Villanueva putting warm rags on her neck and walking with a limp.

The prosecution called Dr. McCormick to testify as to the results of the autopsy and his conclusion that Villanueva died from complications of quadriplegia (most particularly sepsis) resulting from direct trauma to her neck, vascular trauma in that area or both. Prosecution expert Dr. Lorne Label testified as to his understanding that Villanueva's head was "pulled, hyperextended back and twisted, and then [she was] thrown to the ground . . . in a very violent manner" and that Villanueva's reported symptoms and the autopsy results were consistent with such an injury. He opined that those forces, rather than other causes, resulted in injury to Villanueva's cervical spinal cord and that that injury caused her ultimate quadriplegia and death.

Quitiquit's defense had two components. First, the defense focused on discrediting Villanueva's statements to Officer Hellawell, as well as the testimony of Anthony and Julie. Second, the defense challenged the prosecution's evidence of causation.

In this regard, Quitiquit elicited evidence that Villanueva had been in two auto accidents, one in 1997 and another in April 1999, that caused her back pain and neck pain, respectively. Quitiquit also introduced evidence that Villanueva experienced physical problems, including problems with her neck, and sought medical treatment for blood in her urine, side pains while breathing, constipation and hemorrhoids, in 2001.

Quitiquit's daughter Corina testified that Villanueva told her in late June or July of 2002 that the doctors believed a tumor was the cause of her problems.

During defense counsel's cross-examination of Dr. McCormick, the forensic pathologist admitted that the syrinx (a fluid-filled hole) he found on Villanueva's spine could have resulted from a whiplash injury (such as from a car accident) but not manifested any symptoms until a long time afterward. Defense counsel also cross-examined Dr. McCormick regarding the fact that Villanueva's body had mistakenly been embalmed before the autopsy was performed, thus limiting the nature of the review that could be conducted, and questioned him about some conditions with which Villanueva had previously been diagnosed, but that Dr. McCormick had not noted during his examination of her body.

Finally, the defense introduced expert testimony from neuroradiologist Brian Herman, who opined that the likelihood of a trauma causing Villanueva's quadriplegia was "very, very low" and that her symptoms more likely resulted from a tumor or an infectious process. Dr. Herman testified that a twisting of Villanueva's neck in the manner described by Officer Hellawell would have resulted in damage to the bones, muscles and ligaments surrounding her spinal cord, which Villanueva did not exhibit, and would have resulted in immediate quadriplegia, rather than the progressive type that she experienced.

The jury acquitted Quitiquit of second degree murder, but convicted him of voluntary manslaughter and inflicting great bodily injury on a spouse. The trial court imposed the upper term of 11 years on the voluntary manslaughter count and the upper term of 4 years, concurrent, on the spousal abuse count, but stayed the latter term pursuant to Penal Code section 654. Quitiquit filed a notice of appeal from the resulting judgment in the Court of Appeal, Fourth Appellate District, Division Two; after the filing of Quitiquit's opening brief, the matter was transferred to this court by order dated February 16, 2007.

DISCUSSION

1. *Admission of Villanueva's Statements*

Section 1370, subdivision (a), provides:

> "Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met:
> "(1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
> "(2) The declarant is unavailable as a witness pursuant to Section 240.
> "(3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than

five years before the filing of the current action or proceeding shall be inadmissible under this section.
"(4) The statement was made under circumstances that would indicate its trustworthiness.
"(5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official."

Quitiquit contends in part that the court erred in admitting the evidence of Villanueva's April 24 and 25 statements under section 1370 because those statements were not made "at or near the time" of the physical injury or under circumstances indicating their trustworthiness. (§ 1370, subd. (a)(3), (4).) We review the trial court's determination that the foundational requirements for admissibility have been met under an abuse of discretion standard. (*People v. Martinez* (2000) 22 Cal.4th 106, 120, 126.)

A. The "At or Near" Requirement

Although no reported California decision has addressed the scope of section 1370's "at or near" requirement, our role in interpreting the statutory language is clear; we must determine the legislative intent by focusing on the statutory terms, giving the words "their usual and ordinary meaning." (*Daun v. USAA Cas. Ins. Co*. (2005) 125 Cal.App.4th 599, 605.) Where statutory language is unambiguous, no further interpretation is necessary or appropriate. (*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977-978; *Daun, supra,* 125 Cal.App.4th at p. 605 ["it is our role to ascertain the meaning of the words used, not to insert what has been omitted or otherwise rewrite the law to conform to an intention that has not been expressed"].)

The Attorney General contends that the scope of "at or near" requirement of section 1370, subdivision (a)(3), is defined by reference to the second sentence of that provision, which specifies that "[e]vidence of statements made more than five years before the filing of the current action or proceeding *shall be inadmissible* under this section." (Italics added.) He contends that the latter sentence evidences a legislative intent to take statements made within five years of the filing of the action outside of the hearsay rule. However, this argument is belied by the statutory language itself, which relates to the amount of time from the time the statements are made and the time an action arising out of the injuries is filed. (§ 1370, subd. (a)(3).) It has no bearing on the scope of the "at or near" requirement, which relates to the amount of time between the threat or infliction of the injury and the declarant's statements to the testifying witness.

The plain meaning of the phrase "at or near" denotes a time close to the infliction of the injury -- which in most circumstances will be within hours or days, rather than weeks or months. (See *Glatman v. Valverde* (2006) 146 Cal.App.4th 700, 704 [forensic report of a driver's blood alcohol level, prepared a week after his blood was tested, was not made "at or near" the time of the blood test as required for the admissibility of a public record under § 1280].) By imposing this requirement in addition to requiring that

there be other indicia of the statements' trustworthiness (§ 1370, subd. (a)(3), (a)(4)), the Legislature evinced its intent to limit the section 1370 hearsay exception to those statements made close in time to the infliction of the injury, to provide some assurance that the statements would relate to facts fresh in the declarant's mind and reduce the risk that the statements resulted from the declarant's prevarication or coaching by third parties. (See *People v. Kons* (2003) 108 Cal.App.4th 514, 522-523; see also *People v. Martinez, supra,* 22 Cal.4th at p. 128.)

Such an interpretation is supported by legislative history materials underlying section 1370. Earlier versions of the proposed legislation did not include the "at or near" requirement, but instead provided that the infliction or threat of harm could not be "remote," under the circumstances, from when the statement was made. (Sen. Amend. to Assem. Bill No. 2068 (1995-1996 Reg. Sess.) June 24, 1996, § 1.) However, after the Litigation Section of the California State Bar objected that the proposed bill's failure to require a "temporal connection" between the unavailable witness's statement and the event to which it related (i.e., the infliction of the threat or injury) might facilitate the fabrication of statements to support a particular litigant's position (for example, in divorce cases) (Barry Rosenbaum, State Bar Litigation Section, Legislative Com., mem. to Larry Doyle, Director, Office of Governmental Affairs re Assem. Bill No. 2068 (1995-1996 Reg. Sess.) May 28, 1996, p. 3), the bill was amended to include the "at or near" language, as proposed by the Litigation Section so that there would be "a short time frame" between the making of the statement and the event to which it related. (Sen. Amend. to Assem. Bill No. 2068 (1995-1996 Reg. Sess.) June 24, 1996, § 1; see also Sen. Com. on Criminal Procedure Analysis of Assem. Bill No. 2068 (1995-1996 Reg. Sess.) as amended June 17, 1996.)

Although a trial court retains broad discretion to determine whether a particular statement was "at or near" the infliction of the injury for the purposes of section 1370, subdivision (a)(3), we conclude that absent special circumstances, a statement about a physical injury made almost two months after its infliction does not satisfy the statutory time limit. Here, Villanueva started seeing doctors within a week after her purported injury and had numerous opportunities, as well as a motivation, to give her medical providers about accurate information about circumstances that may have caused her injuries. Villanueva specifically denied that she had suffered any trauma to her neck until almost two months after the incident, a time period during which she would have had an opportunity to contrive a story or be coached by her children, at least one of whom was quite angry at Quitiquit, to do so. Under these circumstances, we conclude that section 1370's requirement that the statement be made "at or near" the time of the event is not satisfied.

B. The Trustworthiness Requirement

With respect to Villanueva's statements to Officer Hellawell, we also agree with Quitiquit's contention that the prosecution failed to provide a sufficient foundation to

show the statements were made under circumstances showing they were trustworthy. (§ 1370, subd. (a)(4).)

> "Circumstances relevant to the issue of trustworthiness include, but are not limited to, the following:
> "(1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.
> "(2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.
> "(3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section." (§ 1370, subd. (b).)

The Attorney General contends that Villanueva's initial refusal to prosecute Quitiquit establishes that her statements were not made in contemplation of litigation, but instead for the purpose of making a paper trail so that she could get a protective order against him, and that she did not have any bias or motive for fabricating the statements. However, there are several problems with this argument. First, there is no evidence in the record to establish that Villanueva's motivation for the disclosure was to obtain a protective order. Second, such a motivation would in any event establish that the statements *were* made in contemplation of litigation in which Villanueva would have been the applicant seeking relief. Finally, there is no basis for believing that her statements were accurate or that she had no motive to lie. (See *People v. Pantoja* (2004) 122 Cal.App.4th 1, 13 [a person seeking a restraining order has an interest in the outcome and thus has a "potential bias[] and a motive to stretch the truth"].)

Further, Villanueva's specific statements to Officer Hellawell were not substantiated by other admissible evidence. Other than Villanueva's general statement to Dr. Kyaw that her husband had twisted her neck, there was no corroboration for the version of the events she described to Officer Hellawell, a violent, deliberate and intentional act in which Quitiquit grabbed her under her chin, twisted her neck and threw her from her bed onto the floor. Julie testified that she heard her parents arguing and then saw her father standing over her mother. Anthony testified that during the argument, he heard Quitiquit grunt and Villanueva gasp for air. Neither witness testified to hearing or seeing anything that would corroborate that Quitiquit violently threw Villanueva to the floor by grabbing and twisting her neck, despite the uncontroverted evidence that the mobile home had thin doors through which sound easily traveled.

Additionally, Villanueva spent substantial time with her children while in the hospital, providing an opportunity for them to contrive a story to explain Villanueva's medical condition. This opportunity to reflect and deliberate on the events rendered the accuracy of Villanueva's belatedly disclosed description of events to be inherently suspect (see *People v. Kons, supra,* 108 Cal.App.4th at p. 524 [noting the fact that the victim was "visiting with friends [at the hospital], who may or may not have been able to coach him about his statement" was a factor in establishing the victim's statement to

police officers was not trustworthy]), particularly in light of her earlier denials that she had suffered any trauma.

An equally significant factor relating to the trustworthiness of Villanueva's statements to Officer Hellawell was the uncontroverted evidence that she was partially "incoherent" and was in a "sleep state" at the time she made the statements. Although Officer Hellawell said he believed Villanueva understood what she was saying, there is substantial question whether a person who is making statements in a "sleep state" is able to accurately recall events from seven weeks earlier or is accurately able to communicate her recollection of those events. Given her medicated condition and the fact that she had suffered substantial pain for the previous six weeks, there is a risk that Villanueva's recollection of the events was influenced by the serious symptoms she was suffering at the time she made the statements.

The evidence at trial thus did not establish that Villanueva's statements to Officer Hellawell were trustworthy so as to permit admission of the statements under section 1370. Absent the opportunity for cross-examination to test the veracity of Villanueva's statements, the jury was presented with a graphic description of Quitiquit's conduct that he could not fairly challenge at trial.

C. Conclusion

The prosecution failed to show that Villanueva's statements to Dr. Kyaw and Officer Hellawell were made "at or near" the infliction of the injury to which the statements related or that the statements to Officer Hellawell were made under circumstances showing the statements were trustworthy. Thus, the court erred in admitting the statements under section 1370.

2. *Prejudice*

The admission of hearsay statements erroneously admitted under section 1370 constitutes reversible error "if it is 'reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*People v. Pantoja*, *supra*, 122 Cal.App.4th at p. 13, quoting *People v. Watson* (1956) 46 Cal.2d 818, 836.) In his opening brief, Quitiquit argued that the admission of Villanueva's statements to Officer Hellawell and to Dr. Kyaw were prejudicial, a claim that the Attorney General has made no attempt to dispute despite having been granted an opportunity to file a supplemental response relating to that issue. On our review of the entire record, we agree the error was prejudicial under the *Watson* standard.

The centerpiece of the prosecution's theory in the case was that Quitiquit was guilty of murder and/or manslaughter because of the violent manner in which he committed the crime, a theory that was almost entirely dependent on the admission of Villanueva's statements to Officer Hellawell concerning Quitiquit's conduct on March 6. At the outset of her closing argument, the prosecutor stated that Quitiquit had "sealed [Villanueva's] fate by pulling her off the bed, twisting her neck in a jerking motion, and

[throwing] her down to the floor." The prosecutor quoted or paraphrased Villanueva's statements to Officer Hellawell at least eight more times during the remainder of her argument, emphasizing that those statements established Quitiquit's malice (a necessary element of the murder charge) or conscious disregard of the danger to Villanueva's life (an element of the lesser included offense of voluntary manslaughter).

Further, the record establishes that the evidence of Villanueva's statements to Officer Hellawell were important to the jury's decision-making. Shortly after deliberations began, the jury asked to see Officer Hellawell's written report of his interview with Villanueva. After the court denied the request because the report was "not in evidence," the jury asked to have Officer Hellawell's testimony re-read, strongly suggesting that the inadmissible evidence was a factor in their decision to convict Quitiquit. (See *Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 152 [jury's requested rereading of erroneous jury instruction is a relevant factor in assessing prejudice].)

Because the error in admitting Villanueva's hearsay statements to Officer Hellawell and Dr. Kyaw went to the heart of the prosecutor's case against Quitiquit, it was prejudicial as to both counts of which he was convicted. Accordingly, we must reverse the judgment of conviction on the basis of that error.

DISPOSITION

The judgment is reversed.

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McINTYRE J.

I CONCUR:

O'ROURKE, J.

HALLER, J., Concurring.

The majority concludes Villanueva's statements to Dr. Kyaw and Officer Hellawell were inadmissible hearsay. For the reasons explained below, I respectfully disagree with the majority's analysis on this issue. However, I concur in the result because the admission of Villanueva's statements to Officer Hellawell constituted prejudicial error on another ground. As the Attorney General admits, Villanueva's statements to Officer Hellawell were testimonial. (See *Davis v. Washington* (2006) 547 U.S. __, __ [126 S.Ct. 2266, 2273-2274]; *People v. Cage* (2007) 40 Cal.4th 965, 975-984.) Thus, the admission of the statements violated Quitiquit's constitutional confrontation clause rights.[1] (See *Crawford v. Washington* (2004) 541 U.S. 36, 42-69.) The error was prejudicial because Villanueva's statements to Officer Hellawell were the linchpin of the prosecutor's theory against Quitiquit.

My disagreement with the majority's hearsay analysis rests on my view that the trial court did not abuse its discretion in concluding Villanueva's statements satisfied the "at or near" requirement of Evidence Code section 1370, subdivision (a)(3).[2] Under this subdivision, the court must find "[t]he statement was made at or near the time of the infliction or threat of physical injury." (§ 1370, subd. (a)(3).) The dictionary defines the word "near" to mean "close" or "not far distant in time, place, or degree." (Webster's 11th Collegiate Dict. (2006) p. 828.) This definition reflects what would be the common understanding of the word "near." But it is unhelpful because the determination of what is "near," "close," or "not far distant" is necessarily relative. (See *Sublett v. City of Tulsa* (Okla. 1965) 405 P.2d 185, 202 [the word "near" is "a term of relative signification without positive or precise meaning and locates nothing with any degree of precision"].) Whether an event is "near" to another event necessarily depends on the perspective of the observer and the reason or purpose for measuring the time.

This concept of "near" as a flexible measurement of time is reflected in the California Supreme Court's analysis of the similarly worded "at or near" requirement in the public records exception to the hearsay rule. (§ 1280, subd. (b)[3]; *People v. Martinez* (2000) 22 Cal.4th 106, 126-128.) In *Martinez*, the trial court relied on this exception to admit a computer generated printout of the defendant's criminal history (known as a CLETS document) for purposes of proving the criminal history, despite that there may

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1 In a supplemental brief, the Attorney General asserts for the first time that Quitiquit waived the confrontation clause violation based on the forfeiture by wrongdoing doctrine. (See *People v. Giles* (2007) 40 Cal.4th 833, 840-855.) However, I am unconvinced the issue can be decided as a matter of law on the record before us. Unlike *Giles*, the evidence as to whether Quitiquit's actions were the cause of Villanueva's death was hotly disputed.

2 All further statutory references are to the Evidence Code.

3 Section 1280 provides: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered . . . to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) *The writing was made at or near the time of the act, condition, or event.* [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (Italics added.)

have been a 30- to 90-day delay in recording the relevant information. (*People v. Martinez, supra,* at pp. 126-127; *id.* at pp. 140-141 (dis. opn. of Werdegar, J.).) The California Supreme Court held the trial court did not abuse its broad discretion in determining this evidence satisfied the statutory "at or near" element. (*Id.* at p. 126.) In so concluding, the *Martinez* court emphasized that the "at or near" statutory phrase "'is not to be judged . . . by arbitrary or artificial time limits, measured by hours or days or even weeks.' [Citation.] Rather, 'account must be taken of practical considerations,' including 'the nature of the information recorded' and 'the immutable reliability of the sources from which [the information was] drawn.' [Citation.] 'Whether an entry made subsequent to the transaction has been made within a sufficient time to render it within the [hearsay] exception depends upon whether the time span between the transaction and the entry was so great as to suggest a danger of inaccuracy by lapse of memory.' (2 McCormick on Evidence (4th ed. 1992) § 289, p. 273, fn. omitted.)" (*People v. Martinez*, *supra*, 22 Cal.4th at p. 128; see also *Glatman v. Valverde* (2006) 146 Cal.App.4th 700, 703-706 [applying a "'lapse of memory'" test to section 1280's "at or near" requirement].)

After reviewing section 1370's statutory language and framework and its legislative history, I am satisfied the Legislature intended to provide the same broad discretion to a trial court in determining whether a statement was made at or near the time of the infliction of the injury, and that a lapse-of-memory test is the appropriate guide to applying the statutory requirement. In enacting section 1370, the Legislature sought to broaden the circumstances under which hearsay may be admitted at a criminal trial to ensure a jury will hear the truth about past physical abuse when the victim is no longer available to testify.[4] (Concurrence in Sen. Amends., Assem. Bill No. 2068 (1995-1996 Reg. Sess.) as amended Aug. 8, 1996, p. 2.) Although the Legislature imposed limits on the admissibility of this evidence to protect criminal defendants against false accusations, the Legislature sought to provide the trial court with substantial discretion to admit hearsay statements if the court is assured the statements are trustworthy and reliable. (*Ibid.*)

Given this legislative intent and the use of the relative term "near," the Legislature did not impose strict artificial time limits on the admissibility of a hearsay statement under section 1370, subdivision (a)(3). Rather, the Legislature intended to provide a trial court discretion to admit a statement if it was made when the incident was fresh in the victim's mind and not so long after the incident to put into question the statement's trustworthiness and reliability. This approach is consistent with the view of a leading commentator on California Evidence law. (1 Jefferson, Cal. Evidence Benchbook (3d ed. 1998) § 18.57, p. 280 [stating that under section 1370 a statement "made within 3 months of the injury . . . should qualify as being made near the time of injury"].)

Under these principles, there was a substantial evidentiary basis for the trial court to find Villanueva's statements were made sufficiently "near" the time of the event to

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4 The legislation was enacted as a specific reaction to the trial court's rulings in the O.J. Simpson trial that excluded certain hearsay statements contained in the victim's diary. (Concurrence in Sen. Amends., Assem. Bill No. 2068 (1995-1996 Reg. Sess.) as amended Aug. 8, 1996, p. 2.)

satisfy the statutory requirement. First, the facts supported that the event was still fresh in Villanueva's mind. Although the claimed injury occurred seven weeks earlier, the statement was about a violent traumatic event (rather than a collateral detail) that was not likely to be forgotten by the injured person.

These circumstances distinguish this case from *Glatman v. Valverde, supra,* 146 Cal.App.4th 700, upon which the majority relies. (Maj. opn. at p. 11.) In *Glatman*, forensic analysts recorded the suspect's blood alcohol level one week after the blood sample was drawn and analyzed. In concluding the recording was not "at or near" the event, the *Glatman* court applied *Martinez*'s lapse-of-memory test and determined there was no reasonable basis to conclude that the laboratory employees could accurately memorize and then recall the specific numerical test result one week later. (*Glatman, supra,* at pp. 704-705.) This case is materially different. Villanueva was relating a violent injury that was inflicted on her and for which she remained hospitalized. The trial court had ample basis to conclude that—unlike a laboratory worker who could not reasonably "retain all the test results in his or her head"—there was no danger that Villanueva could not accurately recall this specific incident of violent conduct by her husband. (*Ibid*.)

Further, it has long been recognized that a patient's statement to his or her doctor about the patient's injuries is inherently likely to be true. Although Villanueva's prior denials are relevant in determining the reliability of her later statements, the trial court had a reasonable basis to conclude that under the circumstances the prior denials did not preclude a finding that the statements were timely made. The prosecution presented evidence that Quitiquit did not want Villanueva to disclose his abusive acts, and presented evidence from which it could be inferred that Villanueva was afraid of her husband. The trial court had a reasonable basis to find this fear adequately explained why Villanueva initially refused to disclose the assault to medical personnel or the police.

Additionally, the fact that Villanueva waited to disclose Quitiquit's conduct until the day before her hospital discharge is consistent with the surrounding circumstances. If Villanueva believed her physical condition would improve while in the hospital, she could have believed there was no reason to disclose the neck trauma. However, on the day before the hospital intended to discharge her, she had not improved and had continuing debilitating symptoms. At that point, it was reasonable for her to finally understand that it was necessary to tell the truth to her doctor to obtain proper medical treatment and to document the issue with the police.

With respect to the majority's concern that Villanueva had time to deliberate on her statements, the Legislature did not require that a statement under section 1370 be made "spontaneously while the declarant was under the stress of excitement" of the event. (§ 1240.) Thus, unlike statements admitted under the spontaneous statement hearsay exception of section 1240, the Legislature necessarily intended that the section 1370 exception would apply even if the declarant had some time to reflect on his or her statement. Although the extent of the opportunity for deliberation and reflection is an important factor in the trustworthiness analysis (§ 1370, subd. (a)(4)), it does not in and

of itself render the hearsay exception inapplicable under the statutory timeliness requirement (§ 1370, subd. (a)(3)).

As with other hearsay exceptions, "[a] trial court has broad discretion in determining whether a party has established [the statutory] foundational requirements. [Citation.]" (*People v. Martinez*, *supra*, 22 Cal.4th at p. 120.) The determination of what is "'"at or near . . ."' . . . 'is a matter of degree and calls for the exercise of reasonable judgment *on the part of the trial judge*.' [Citation.]" (*Id.* at p. 128, fn. 7, citing 1 Jefferson, Cal. Evidence Benchbook, *supra*, § 4.8, pp. 114-115.) "A reviewing court may overturn the trial court's exercise of discretion '"only upon a clear showing of abuse."' [Citations.]" (*Id.* at p. 120.) On the record before us, the trial court did not abuse its discretion in finding the statements were sufficiently timely to satisfy section 1370, subdivision (a)(3).

HALLER, Acting P. J.