

Memorandum 2008-7

**Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing
(Draft Recommendation)**

At the request of the Senate Committee on Judiciary, the Commission has been studying forfeiture by wrongdoing as an exception to the hearsay rule. The Commission's report is due by March 1, 2008.

Attached for the Commission's consideration is a draft recommendation. Also attached is a comment submitted by Prof. Deborah Tuerkheimer, University of Maine School of Law (Exhibit pp. 1-8).

The Commission should review these materials and determine whether to approve the draft as a final recommendation, with or without revisions. The Commission is not scheduled to hold another meeting before the upcoming deadline, so it should approve a final recommendation at this meeting if possible.

DRAFT RECOMMENDATION

At the January meeting, the Commission directed the staff to prepare a draft recommendation along the following lines:

- The previously proposed revisions of Evidence Code Section 240 relating to a refusal to testify should be included in the draft.
- The previously proposed revisions of Evidence Code Section 240 relating to memory loss should not be included in the draft.
- The draft should point out that *People v. Giles* is pending in the United States Supreme Court (No. 07-6053) and a decision is expected by late June. The draft should advise the Legislature to wait for that decision before determining the best long-term approach to forfeiture by wrongdoing as an exception to the hearsay rule.
- The draft should describe the four options discussed in the tentative recommendation (Options #1-#4), issues relating to those options, and points for the Legislature to consider in determining how to proceed.

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 draft should mention the possibility of referring the matter back to the Commission for further study after *Giles* is decided. The draft should neither advocate nor discourage this approach.

Minutes (Jan. 2008), p. 3.

The attached draft implements these decisions. The staff regrets that we were not able to issue it sooner, but we underestimated how much effort it would take to prepare.

Commissioners and interested persons should consider whether any revisions of the draft are necessary.

COMMENTS OF PROF. TUERKHEIMER

Prof. Tuerkheimer has provided the Commission with a copy of a law review article she wrote on forfeiture in domestic violence cases. See Exhibit pp. 1-8. The article makes the following points:

- A forfeiture finding should not require proof of intent to prevent testimony.
- No special rule is required for judicial forfeiture determinations in domestic violence cases.
- Forfeiture case law needs to recognize the dynamics of battering.
- In particular, the dynamics of battering warrant (1) an expanded conception of “wrongdoing” and (2) an expanded conception of causation of a witness’ unavailability.

Prof. Tuerkheimer makes clear that she is “not advocating a categorical finding of forfeiture in domestic violence cases.” *Id.* at 7.

The staff appreciates Prof. Tuerkheimer’s participation in this study. The attached draft refers to her article in a number of places.

STUDENT ASSISTANCE

The attached draft includes a section on forfeiture law in jurisdictions other than California and the federal courts. The staff prepared this section with assistance from Elizabeth Lyon, a third year student at Hastings College of the Law. We are grateful for her help.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

**EMAIL FROM PROF. DEBORAH TUERKHEIMER,
UNIVERSITY OF MAINE SCHOOL OF LAW (1/23/08)**

Dear Commissioners:

I understand that you are contemplating changes to California's forfeiture by wrongdoing exception to the hearsay rule, although you may advise the legislature to wait for the Supreme Court's decision in Giles before proceeding. Whenever the merits of the proposal are considered, I would hope that the impact of any change on domestic violence cases is fully taken into account. Apropos of this concern, I am attaching a brief essay that I have published on the subject.

Thank you for your consideration.

Deborah Tuerkheimer
Professor of Law
University of Maine

Forfeiture in the Domestic Violence Realm

Deborah Tuerkheimer*

She told the treating doctor that her boyfriend had tried to rip her tongue out.¹

At the time of the trial, however, the prosecutor was unable to produce [her].²

I. Forfeiture As The “Next Frontier” in Domestic Violence Prosecution³

More often than not, a victim of domestic violence is reluctant or unwilling to assist with the prosecution of her batterer. This phenomenon cannot be understood without reference to the abusive relationship, a relationship characterized by a continuing pattern of power and control.

The dynamics of abuse put unique pressures on a battered woman to ally herself with the defendant, against the State. In domestic violence cases, cooperating with prosecutorial efforts may jeopardize a victim’s financial resources, immigration status, children, living arrangements, employment, and relations with friends, family, and the larger community. A victim may also resist testifying against her batterer because of a “continued emotional connection” that “entrap[s]” her in the abusive relationship.⁴ Most likely, however, she is uncooperative because she fears—often rightly—that by assisting prosecutors she will cause herself more severe abuse.⁵

Adjusting to these realities, prosecutors have shifted their response to battering in recent decades in order to successfully try cases in which the complaining witness becomes unwilling to testify against her abuser. Before

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1. *People v. Lugo*, E033252, 2004 Cal. App. Unpub. LEXIS 8498, at *2 (Ct. App. Sept. 20, 2004).

2. *Id.* at *3.

3. I first used this phrase in an article describing a fundamental disconnect between the dynamics of battering and traditional forfeiture paradigms and it articulates the theoretical underpinnings of a reconceived doctrinal framework. Deborah Tuerkheimer, *Crawford’s Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 37–49 (2006) [hereinafter *Crawford’s Triangle*]. This Essay represents an effort to further develop this framework.

4. Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims’ Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL’Y & L. 465, 479 (2003) (“[A] victim may come to tolerate or rationalize the abuse out of a sense that she is too invested in the relationship to consider leaving it. The batterer’s own denial about the seriousness of the abuse and his promises that it will never happen again also may exert considerable influence, particularly if he has isolated her from others who might challenge this perspective.”).

5. *See id.* at 489 n.8 (citing research showing that the most common reason that victims refuse to cooperate in domestic violence cases is fear of retaliation).

the Supreme Court's reinterpretation of the Confrontation Clause, prosecuting domestic violence without the testimony of a victim (known as "victimless" prosecution) by using various hearsay exceptions to admit her out-of-court statements had become commonplace. The Court's decisions in *Crawford v. Washington*⁶ and *Davis v. Washington*⁷ have transformed this landscape. Because the designation of a statement as "testimonial" now subjects it to exclusion, the viability of a significant number of formerly prosecutable domestic violence cases has been undermined.

The rule of exclusion is not absolute, however. The equitable doctrine of forfeiture, which the Court affirmed most recently in *Davis*,⁸ precludes a defendant from using his right to confrontation to bar the admission of a victim's statements when his wrongdoing caused her unavailability at trial. If the prosecution can prove that a declarant is absent because of misconduct on the part of the defendant, then he will be deemed to have forfeited his constitutional right to confront her in court.

The doctrine of forfeiture is only beginning to be applied in the domestic violence realm in the wake of the new Confrontation Clause jurisprudence. Because both the uncooperative abuse victim and the exclusion of her testimonial statements at trial are intractable realities, faithful adherence to the principles underlying the traditional doctrine of forfeiture is essential to the effective prosecution of batterers. Recognizing this, Professor Tom Lininger has proposed an innovative forfeiture statute that would define a new hearsay exception. The rule would clarify that the defendant need not specifically intend to procure the absence of a declarant if her unavailability was a foreseeable consequence of his conduct.⁹ Noting the particular importance of "align[ing] the hearsay exceptions with the contours of the constitutional forfeiture doctrine," Lininger persuasively argues for the codifying of the common law doctrine of forfeiture into the evidence rules.¹⁰ Because courts have tended to conflate evidentiary and constitutional forfeiture analyses and will likely continue to do so, Lininger's enlightened statutory approach—which recognizes that forfeiture in domestic violence cases is unique—has great potential to guide the development of similarly enlightened case law. Since courts are not bound by the evidence rules when interpreting the scope of the defendant's Confrontation Clause right,

6. 541 U.S. 36, 69 (2004) (classifying battered spouse's statement as testimonial and noting that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation").

7. 126 S. Ct. 2266, 2273 (2006) (explaining that the Confrontation Clause requires testimonial statements of a witness to be admissible only if the witness is unavailable to testify, which bars testimonial statements where a battered spouse refuses to be present in the courtroom).

8. *See id.* at 2280 (reiterating the Court's previously established notion that "'the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds'" (quoting *Crawford*, 541 U.S. at 62)).

9. Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEXAS L. REV. 271, 301–02 (2006).

10. *Id.* at 301.

however, a statute cannot dictate such guidance. The appropriate definition of the boundaries imposed by the Constitution on forfeiture therefore remains critical.

More specifically, forfeiture doctrine must take account of the ways in which battering is different from paradigmatic crime. This does not require a “special rule” for judicial forfeiture determinations in domestic violence cases, but rather the evolution of case law that comports with the realities of battering. Unless courts understand the dynamics of abuse, forfeiture principles cannot be fairly implemented in domestic violence cases.

Put simply, in order to make decisions consistent with the equitable underpinnings of the rule, judges must have accurate conceptions of battering. To see how this proposition could be implemented, it is helpful to examine each element a prosecutor must prove at a forfeiture hearing: (1) that the defendant engaged in wrongdoing; and (2) that the wrongdoing caused the declarant’s unavailability as a witness.¹¹ It is my contention that, with respect to each inquiry, the dynamics of battering warrant an expanded conception of both wrongdoing and causation of a witness’s unavailability.¹²

II. The Meaning of Wrongdoing

In a conventional witness tampering case, the “tampering behavior” is generally quite easy to identify. A defendant who threatens to harm a witness for testifying in a pending case, coerces false testimony, or pays a witness to disappear clearly engages in conduct wrongful for purposes of a forfeiture finding. In contrast, batterers often “tamper” with their witnesses in ways that fall outside of this paradigm, which raises the question of what qualifies as “wrongdoing” in the nonparadigmatic fact pattern.

In domestic violence cases, departures from the conventional tampering archetype may be characterized as temporal in nature. These departures subvert overly restrictive analysis of the relevant time frame. The following scenario illustrates this proposition: Prior to his arrest on current charges, the defendant frequently and explicitly threatened to harm the victim if she ever helped to put him in jail. Although the defendant lacked the specific intent to procure the victim’s unavailability as a witness at the particular trial at issue, it would be bizarre to contend that his conduct is any less wrongful simply because it did not occur in anticipation of his arrest in the instant case.

11. Discussion of the victim “unavailability” requirement for proving forfeiture is beyond the scope of this Essay. I have previously suggested that in domestic violence cases, the reasonableness of prosecutorial efforts to procure a declarant’s trial testimony should be analyzed contextually. See Crawford’s *Triangle*, *supra* note 3, at 42 (explaining that “[i]n the classic forfeiture scenario, a person charged with a crime wrongfully procures the unavailability of a witness who would have testified to the accused’s involvement in the underlying (charged) crime”).

12. The inquiries discussed below would presumably also arise under Tom Lininger’s proposed forfeiture statute, under which prosecutors would be required to prove that the defendant’s conduct constitutes “wrongdoing” and that this wrongdoing “did in fact proximately cause” the declarant’s absence from trial.

The greater conceptual challenge is posed by a majority of victimless domestic violence prosecutions in which the batterer is able to effectively control the victim's decisionmaking without using explicit threats. In these cases, the relationship has been abusive for some period of time leading up to the defendant's arrest. Perhaps law enforcement has already intervened and perhaps not. Regardless, the victim has endured a pattern of violent behavior characterized by the defendant's exertion of power and control over her. The physical violence—most salient from a law enforcement perspective—does not fully encompass the “continuum of sexual and verbal abuse, threats, economic coercion, stalking, and social isolation”¹³ that the battered woman has experienced. Because she is intimately familiar with the defendant's modus operandi, she concludes that it is in her best interest not to cooperate with prosecutors. Although an amalgam of concerns may animate her reluctance to testify against her abuser, her primary motivation is most often fear of further, escalating abuse.¹⁴

The important point is that the victim's fears regarding the collateral consequences of testifying are based on the totality of the abuse that she has suffered. There is no one “moment in time” that captures the tampering incident. Put differently, a transactional model of wrongdoing—an implicit judicial requirement that wrongdoing manifest as a discrete incident—necessarily overlooks much of the defendant's wrongdoing.

Inquiry into whether “wrongdoing” has occurred must, then, be temporally encompassing if the equitable function of forfeiture doctrine is to be served. By “temporally encompassing,” I mean taking into account both the multifaceted dimensions of domestic violence and its patterned nature—the very dynamics that distinguish battering from other types of violent crime. These dynamics exacerbate the moral wrong of domestic violence and surely do not diminish it. Judicial determinations of whether the defendant has engaged in misconduct that qualifies as grounds for forfeiture must take into account this reality.

13. ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 65 (2000). For a more complete account of the dynamics of battering, see Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 962–69 (2004).

14. As the West Virginia Supreme Court has explained:

Battered women are at an extremely heightened risk of violence—and even death—at the moment they seek to separate from their abusers. Cooperation in a criminal prosecution is often meant and understood, by both the abuser and victim, as a means of formally separating from an abuser—and thus, presents increased danger to the victim. As a result, many individuals who have experienced domestic violence quite reasonably conclude that criminal prosecution of their abusers will leave them less, rather than more, safe.

State v. Mechling, 633 S.E.2d 311, 324–25 (W. Va. 2006) (internal citations omitted).

III. Perceiving Causation

For a defendant to forfeit his right to confrontation, his wrongful conduct must cause the unavailability of the declarant at trial. In domestic violence cases a victim may be absent for reasons clearly related to the defendant's actions, but her reasons may also be related to the prior abuse in ways more difficult to perceive (or even unrelated to it altogether).¹⁵

Causation is most readily identifiable in cases where, based on past abuse, the victim fears escalating violence should she cooperate with prosecutors. In these cases, it is quite apparent that the defendant's misconduct has resulted in the victim's unwillingness to testify for fear of further jeopardizing her safety. In this relatively large category of cases in which the primary motivating force is fear of future injury, proximate cause may be neatly analogized to the paradigmatic domain of witness tampering, and can be utilized to satisfy the causation requirement.

The scenarios that challenge conventional understanding are those in which victims are unwilling to testify for reasons less obviously related to the defendant's criminal conduct. A battered woman may distance herself from prosecutors' efforts because she feels that she deserves to be victimized,¹⁶ because she still loves the defendant,¹⁷ because she fears losing custody of her children to her batterer,¹⁸ and so forth. Under these circumstances, how should a court assess whether the defendant's pattern of behavior has caused the victim's unavailability?

If the victim's decision not to testify may fairly be viewed as one that has not been substantially influenced by the defendant's pattern of abuse, his misconduct cannot be said to have caused her unavailability.¹⁹ That said, the fact that a victim expresses motivations other than fear of further violence

15. For purposes of this discussion, I am setting aside questions of proof in order to examine the conceptual framework underlying the issue of causation. For an analysis of how forfeiture may be proven, see Deborah Tuerkheimer, *A Relational Approach to Confrontation*, 15 J.L. & POL'Y (forthcoming 2007).

16. See, e.g., *People v. Kilday*, 20 Cal. Rptr. 3d 161, 165 (Ct. App. 2004), *review granted*, 105 P.3d 114 (Cal. 2005) (victim expressed that she "deserve[d]" to be cut with glass and burned with a hot iron).

17. See, e.g., *People v. Santiago*, No. 2725-02, 2003 WL 21507176, at *13 (N.Y. Sup. Ct. Apr. 7, 2003) (finding that the victim's "current attitude toward testifying is a classic example of a battered woman's reaction to what has been described as the honeymoon phase of the abusive relationship. [She] is frightened that separation will leave her isolated and without help in caring for her child and her home").

18. "In estranged relationships, threats against the children often become 'tools of terrorism' with which the abuser continues the intimidation, manipulation, and control of his former partner." See Epstein et al., *supra* note 4, at 480.

19. For example, a victim's noncooperation may be entirely motivated by a desire to ensure that her abuser remains at liberty so that he may continue to provide her with financial support. Unless the prosecution can prove that the defendant's criminal course of conduct resulted in the victim's financial dependence on him, a forfeiture finding under these circumstances would be unwarranted.

should not end the judicial inquiry.²⁰ If the defendant's misconduct created the abusive environment that led to the victim's unavailability, his actions may reasonably be viewed as "causal."²¹ Indeed, a more restrictive interpretation of causation would effectively subvert the normative rationale for the rule of forfeiture.

In short, judicial forfeiture determinations predicated on the notion that fear is the sole *sequila* of abuse are inconsistent with by the realities of battering. A more expansive understanding of how domestic violence victims are affected by abuse allows courts to properly evaluate the relationship between a defendant's misconduct and a witness's unavailability.

IV. Conclusion

The approach to forfeiture that I have outlined requires courts to make highly contextualized determinations that take into account the dynamics of battering. The type of inquiry that I envision is fact-bound, which means—to be abundantly clear—that I am not advocating a categorical finding of forfeiture in domestic violence cases. The analysis in which courts must engage is concededly difficult, but it is necessary to evolve the doctrinal framework in accordance with documented realities.

Because domestic violence is fundamentally different from other types of crime, judicial reasoning that defaults to precedent and analogy fosters injustice in cases involving battering.²² No separate rule of "domestic violence forfeiture" is needed; an adequate doctrinal framework would simply reject the notion that a template applied to violence between strangers

20. For instance, a victim may be reluctant to cooperate with the prosecution because of concerns that her immigration status will be jeopardized, that her children will be removed from her custody, or a sense that she deserved to be victimized; each of these reasons for noncooperation may have resulted from the defendant's past battering conduct.

21. The forfeiture determination in *Santiago* exemplifies this mode of reasoning. The court was persuaded that "[t]he complainant's decision not to cooperate with [the] prosecution [was] . . . strongly, if not totally influenced" by a pattern of abuse. *Santiago*, 2003 WL 21507176, at *16. After correctly observing that "the evidentiary consequences would be different in this case if the complainant's choice not to go forward [was] premised exclusively on feelings of love and loyalty to the defendant," the court, however, concluded that "the violent domestic history of these two people, and defendant's recent persistent importuning of the complainant to withdraw from this prosecution, have made clear that [the victim's] choice with respect to continuing this prosecution was not made without fear of the defendant and the complex mix of emotions one might expect to find in a person suffering from Battered Women's Syndrome. Indeed, abuse of the complainant by the defendant is the recurrent theme in the relationship between these two parties." *Id.*

It should be noted that this enlightened judicial analysis is extraordinary. In domestic violence cases similarly diverging from the classic tampering paradigm, courts unaware of the impact of abuse may not connect a victim's absence to the abuse she has suffered without expert testimony on battering and its effects.

22. See Crawford's *Triangle*, *supra* note 3, at 37 (observing that "[w]ithout an appreciation of how domestic violence is different from other types of crime, judicial decisionmaking—which tends to default to reason by way of precedent and analogy—will invariably fall short").

can effectively respond to the particularities of violence between intimates. This reconceived framework represents a commitment to an informed jurisprudence of forfeiture and an insistence that our law remediate all types of crime.

#K-600

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

RECOMMENDATION

Miscellaneous Hearsay Exceptions:
Forfeiture by Wrongdoing

February 2008

California Law Revision Commission
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SUMMARY OF RECOMMENDATION

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

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

Sometimes, however, a person attempts to thwart justice by killing a witness, threatening a witness so that the witness refuses to testify, or engaging in other conduct that prevents a witness from testifying. If such conduct is sufficiently egregious and appropriately proved, it may result in forfeiture of the constitutional right of confrontation, such that there is no constitutional barrier to admission of an out-of-court statement by the unavailable witness.

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

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

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

The Law Revision Commission recommends that the Legislature take no action on forfeiture by wrongdoing until after the United States Supreme Court issues the

forthcoming decision. At that time, the Legislature will be in a better position than at present to assess the merits of the possible approaches.

In its study, the Commission considered the following possibilities:

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

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

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

In addition to studying forfeiture by wrongdoing, the Commission was asked to study whether a witness who refuses to testify should be considered "unavailable" for purposes of the hearsay rule. The Commission recommends that California's provision on unavailability be amended to expressly recognize that a witness is unavailable if the witness refuses to testify on a subject, despite a court order to do so. This reform is in order regardless of how the United States Supreme Court rules on forfeiture of the federal constitutional right of confrontation.

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

ACKNOWLEDGMENTS

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

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

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MISCELLANEOUS HEARSAY EXCEPTIONS:
FORFEITURE BY WRONGDOING

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

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

12 A related issue is whether the statutory definition of an “unavailable” witness for
13 purposes of the hearsay rule should expressly include a witness who refuses to
14 testify. The Commission was also asked to study this issue.⁵

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

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

21 Finally, the Commission discusses forfeiture by wrongdoing as an exception to
22 the hearsay rule. Due to a pending decision by the United States Supreme Court,
23 the Commission has concluded that it would be premature to recommend any
24 legislation on this topic at this time. After the Court issues its decision, the
25 constitutional constraints will be more clear than at present, and there will be new
26 analyses of the relevant policy considerations for the Legislature to consider. The

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

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

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

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

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

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

1 Legislature should take no action until after it has the benefit of this guidance,
2 which is expected by the end of June 2008.

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

- 6 • Repeal California’s existing provision on forfeiture by wrongdoing and
7 replace it with a provision that tracks the constitutional minimum as
8 articulated by the California Supreme Court.
- 9 • Replace the existing provision with one similar to the corresponding federal
10 rule.
- 11 • Broaden the existing provision to some extent.
- 12 • Leave the law alone.

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

15 THE HEARSAY RULE AND ITS PURPOSE

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

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

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

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

6. Evid. Code § 1200(a).

7. Evid. Code § 1200 Comment.

8. Evid. Code § 1200(b).

9. Evid. Code § 1200(c).

10. Evid. Code § 1200 Comment.

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

1 has been described as “the ‘greatest legal engine ever invented for the discovery of
2 truth.’”¹²

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

8 A third reason for the hearsay rule is that if a witness testifies before the trier of
9 fact, that enables the trier of fact to take the demeanor of the witness into account
10 in assessing credibility.”¹⁵ A person who sees, hears, and observes a witness may
11 be convinced of, or unpersuaded of, the witness’ honesty, integrity, and reliability.
12 Evaluating the credibility of a witness depends largely on intuition, “that
13 intangible, inarticulable capacity of one human being to evaluate the sincerity,
14 honesty and integrity of another human being with whom he comes in contact.”¹⁶

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

20 THE CONFRONTATION CLAUSE AND ITS PURPOSE

21 Another important limitation on the admissibility of evidence is the
22 Confrontation Clause of the United States Constitution,¹⁷ which is binding on the

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

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

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

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

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

14. *Id.*

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

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

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

1 states.¹⁸ In addition, the California Constitution contains its own Confrontation
2 Clause.¹⁹

3 The state constitutional right of confrontation is not coextensive with the
4 corresponding federal right.²⁰ California is not bound to adopt the same
5 interpretation of its Confrontation Clause that the federal courts adopt with regard
6 to the federal Confrontation Clause.²¹

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

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

15 a personal examination and cross-examination of the witness in which the accused
16 has an opportunity, not only of testing the recollection and sifting the conscience
17 of the witness, but of compelling him to stand face to face with the jury in order
18 that they may look at him, and judge by his demeanor upon the stand and the
19 manner in which he gives his testimony whether he is worthy of belief.²⁵

20 Thus, the hearsay rule and the Confrontation Clause protect similar values. They
21 both ensure that prosecution witnesses testify under oath, subject to cross-
22 examination, and in the presence of the trier of fact.²⁶ The United States Supreme
23 Court has made clear, however, that the Confrontation Clause is not a mere

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

19. Cal. Const. art. I, § 15.

20. *People v. Chavez*, 26 Cal. 3d 334, 351-52, 605 P.2d 401, 161 Cal. Rptr. 762 (1980); see also *In re Johnny G.*, 25 Cal. 3d 543, 556-59, 601 P.2d 196, 159 Cal. Rptr. 180 (1979) (Mosk, J., concurring).

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

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

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

23. Cal. Const. art. I, § 15.

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

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

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

1 codification of the hearsay rule.²⁷ Admission of evidence in violation of the
2 hearsay rule is not necessarily a violation of the right of confrontation.²⁸ Similarly,
3 the Court has more than once found a Confrontation Clause violation even though
4 the statement in question was admitted under a hearsay exception.²⁹

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

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

13 THE *CRAWFORD* AND *DAVIS* DECISIONS

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

22 In *Crawford*, the Court harshly criticized the *Roberts* test. It pointed out that the
23 “principal evil at which the Confrontation Clause was directed was the civil-law
24 mode of criminal procedure, and particularly its use of *ex parte* examinations as

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

28. *Id.* at 156.

29. *Id.* at 155-56.

30. U.S. Const. art. VI, § 2.

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

32. “A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California.” Evid. Code § 1204 (emphasis added).

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

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

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

36. *Id.* at 66.

1 evidence against the accused.”³⁷ The Court explained that in light of this purpose,
2 the *Roberts* test is both overbroad and overly narrow,³⁸ and so unpredictable that it
3 does not provide meaningful protection even with respect to core confrontation
4 violations.³⁹ According to the Court, the most serious vice of the *Roberts* test is not
5 its unpredictability but rather “its demonstrated capacity to admit core testimonial
6 statements that the Confrontation Clause plainly meant to exclude.”⁴⁰

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

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

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

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

37. 541 U.S. at 50.

38. *Id.* at 60.

39. *Id.* at 62-63.

40. *Id.* at 63.

41. *Id.* at 53-54.

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

43. *Id.* at 68.

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

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

4 THE DEFINITION OF UNAVAILABILITY

5 The hearsay rule has many exceptions.⁴⁶ In general, two justifications for these
6 exceptions have been advanced.⁴⁷ First, there is the necessity rationale: An
7 exception may be justified by identifying a special need for the evidence.⁴⁸
8 Second, there is the reliability rationale: An exception may be based on a belief
9 that the circumstances under which a statement was made suggest that the
10 statement is reliable to prove the truth of the matter stated.⁴⁹ These circumstances
11 are considered an adequate substitute for the benefits of cross-examining the
12 declarant under oath in the presence of the trier of fact.⁵⁰

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

17 To facilitate application of these exceptions, both the Evidence Code⁵⁴ and the
18 Federal Rules of Evidence⁵⁵ define what it means for a declarant to be

45. *Id.* at 2273.

46. See Evid. Code §§ 1220-1380.

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

48. *Id.*

49. *Id.*

50. *Id.*

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

52. Fed. R. Evid. 802.

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

54. Evidence Code Section 240 provides:

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

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

(2) Disqualified from testifying to the matter.

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

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

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

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

1 “unavailable.” The federal and the California definitions of “unavailability” are
2 similar, but differ in certain respects. In particular, they differ in their approach to
3 a witness who refuses to testify.⁵⁶

4 **Unavailability of a Person Who Refuses to Testify**

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

8 As a practical matter, a witness who refuses to testify after the court takes
9 reasonable steps to require such testimony is as inaccessible as a witness who is
10 unable to attend the hearing. For example, in a leading California case, a witness

(c) Expert testimony which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term “expert” means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.

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

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

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

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

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

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

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

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

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

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

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

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

58. See Evid. Code § 240.

1 refused to testify for fear of his safety and the safety of his family.⁵⁹ The witness
2 persisted in this position even after he was held in contempt of court. Based on
3 these facts, the trial court found that the witness was unavailable for purposes of
4 the former testimony exception to the hearsay rule.

5 The California Supreme Court upheld that ruling.⁶⁰ Because the California
6 statute on unavailability does not expressly cover a refusal to testify, however, the
7 Court’s determination that the witness was unavailable was based on the provision
8 that applies when a witness is “unable to attend or to testify at the hearing because
9 of then existing physical or mental illness or infirmity.”⁶¹ Specifically, the Court
10 ruled that a trial court is permitted to “consider whether a mental state induced by
11 fear of personal or family harm is a ‘mental infirmity’ that renders the person
12 harboring the fear unavailable as a witness.”⁶²

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

17 **Need for the Reform**

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

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

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

60. *Id.* at 547-52.

61. Evid. Code § 240(a)(3).

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

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

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

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

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

66. Tuerkheimer, *Forfeiture in the Domestic Violence Realm*, 85 Tex. L. Rev. 49, 49-50 (2007).

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

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

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

16 Concern about the impact of *Crawford* could be further alleviated by amending
17 California's statute on unavailability to expressly state that a witness who refuses
18 to testify despite a court order is unavailable for purposes of the hearsay rule. That
19 would not represent a substantive change in existing law, but it would facilitate

67. As Prof. Tuerkheimer explains:

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

Id.

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

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

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

It has also been noted, however, that many techniques are available to address the reasons for a domestic violence victim's refusal to testify. Some data suggests that by using a combination of these techniques, between 65% and 95% of domestic violence victims will fully cooperate with the prosecution. Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution*, 63 Fordham L. Rev. 853, 873 (1994).

70. 126 S.Ct. at 2273.

71. *Id.* at 2276-77.

1 reference to the applicable rules. Courts, attorneys, litigants, and others could
2 simply refer to the text of the statute, without having to search and explain case
3 law on these matters. Amending the statute in that manner would thus help courts
4 and other persons determine whether the requirement of unavailability for certain
5 hearsay exceptions is met.

6 FORFEITURE BY WRONGDOING

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

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

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

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

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

29 *California Approach*

30 The California provision, Evidence Code Section 1350, is detailed and
31 incorporates many safeguards to ensure that it is only invoked where there is
32 strong evidence that a criminal defendant engaged in egregious conduct to prevent
33 a witness from testifying.⁷² The provision was enacted in 1985 to address what is

72. Evidence Code Section 1350 provides:

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

(1) There is clear and convincing evidence that the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose

1 known as the “murdered witness problem” — the unfortunate reality that “serious
2 charges are dismissed, lost or reduced every year because of the unavailability of
3 prosecution witnesses who have been murdered or kidnapped by the persons
4 against whom they would testify.”⁷³

5 ***Federal Approach***

6 The corresponding federal provision, Federal Rule of Evidence 804(b)(6), was
7 enacted only ten years ago. It is broader in scope than the California provision, but
8 it is far less detailed. It creates a hearsay rule exception for a statement that is
9 “offered against a party that has engaged or acquiesced in wrongdoing that was

of preventing the arrest or prosecution of the party and is the result of the death by homicide or the kidnapping of the declarant.

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

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

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

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

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

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

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

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

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

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

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

1 intended to, and did, procure the unavailability of the declarant as a witness.”⁷⁴
2 The provision is intended as a “prophylactic rule” to deal with abhorrent behavior
3 that strikes at the heart of the justice system.⁷⁵

4 ***Differences Between the California Approach and the Federal Approach***

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

- 7 • **Type of Case in Which the Exception Applies.** The California provision
8 applies only in “a criminal proceeding charging a serious felony.”⁷⁶ The
9 federal rule applies in any type of case, civil or criminal.⁷⁷
- 10 • **Party Against Whom the Exception May Be Invoked.** The California
11 provision can be invoked against a party who wrongfully sought to prevent
12 the arrest or prosecution of the party.⁷⁸ There does not seem to be any basis
13 for invoking the California provision against the government. In contrast,
14 the federal rule “applies to all parties, including the government.”⁷⁹
- 15 • **Reason for the Declarant’s Unavailability.** The California provision
16 applies only when the declarant’s unavailability “is the result of the death by
17 homicide or the kidnapping of the declarant.”⁸⁰ Under the federal rule, “[t]he
18 wrongdoing need not consist of a criminal act.”⁸¹
- 19 • **Acquiescence in Wrongdoing that Results in the Declarant’s**
20 **Unavailability.** The California provision applies only when “the declarant’s
21 unavailability was *knowingly caused by, aided by, or solicited by* the party
22 against whom the statement is offered”⁸² In contrast, under the federal
23 rule it is sufficient if a party “has engaged *or acquiesced* in wrongdoing that
24 was intended to, and did, procure the unavailability of the declarant as a
25 witness.”⁸³
- 26 • **Standard of Proof.** The California provision requires “*clear and convincing*
27 *evidence* that the declarant’s unavailability was knowingly caused by, aided

74. According to the advisory committee’s note, the provision was added “to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant’s prior statement when the party’s deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness.”

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

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

76. Evid. Code § 1350(a).

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

78. Evid. Code § 1350(a)(1).

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

80. Evid. Code § 1350(a)(1).

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

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

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

1 by, or solicited by the party against whom the statement is offered for the
 2 purpose of preventing the arrest or prosecution of the party and is the result
 3 of the death by homicide or the kidnapping of the declarant.”⁸⁴ The federal
 4 rule does not expressly state the applicable standard of proof, but the
 5 advisory committee’s note explains that the “usual Rule 104(a)
 6 *preponderance of the evidence standard* has been adopted in light of the
 7 behavior the new Rule 804(b)(6) seeks to discourage.”⁸⁵

- 8 • **Evidence that the Proponent of the Hearsay Statement Is Responsible**
 9 **for the Declarant’s Unavailability.** The California provision cannot be
 10 invoked if there is “evidence that the unavailability of the declarant was
 11 caused by, aided by, solicited by, or procured on behalf of, the party who is
 12 offering the statement.”⁸⁶ The federal rule does not include such a
 13 limitation.⁸⁷
- 14 • **Form of the Hearsay Statement.** The California provision applies only if
 15 the hearsay statement “has been memorialized in a tape recording made by a
 16 law enforcement official, or in a written statement prepared by a law
 17 enforcement official and signed by the declarant and notarized in the
 18 presence of the law enforcement official, prior to the death or kidnapping of
 19 the declarant.”⁸⁸ The federal rule does not impose any limitations on the
 20 form of the hearsay statement.⁸⁹
- 21 • **Circumstances Under Which the Hearsay Statement Was Made.** The
 22 California provision can be invoked only if the hearsay statement “was
 23 made under circumstances which indicate its trustworthiness and was not
 24 the result of promise, inducement, threat, or coercion.”⁹⁰ The federal rule
 25 does not include such a limitation.⁹¹
- 26 • **Relevance of the Hearsay Statement.** The California provision expressly
 27 states that the hearsay statement must be “relevant to the issues to be
 28 tried.”⁹² The federal rule includes no such language.⁹³ In both contexts, such
 29 language is unnecessary due to the general prohibition on introducing
 30 irrelevant evidence.⁹⁴
- 31 • **Evidence Connecting the Defendant to Commission of the Serious**
 32 **Felony Charged.** Under the California provision, the hearsay statement

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

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

86. Evid. Code § 1350(a)(2).

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

88. Evid. Code § 1350(a)(3).

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

90. Evid. Code § 1350(a)(4).

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

92. Evid. Code § 1350(a)(5).

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

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

1 cannot be the sole evidence that connects the defendant to the serious felony
2 charged against the defendant. Rather, the statement is admissible only if it
3 “is corroborated by other evidence which tends to connect the party against
4 whom the statement is offered with the commission of the serious felony
5 with which the party is charged.”⁹⁵ “The corroboration is not sufficient if it
6 merely shows the commission of the offense or the circumstances thereof.”⁹⁶
7 The federal rule includes no such requirement.⁹⁷

- 8 • **Notice of Intent to Invoke the Forfeiture by Wrongdoing Exception.** The
9 California provision requires the prosecution to notify the defendant ten
10 days before the prosecution offers a hearsay statement under the provision.⁹⁸
11 The federal rule does not require a party to give advance notice of intent to
12 invoke the rule.⁹⁹
- 13 • **Procedure for Determining Whether the Exception Applies.** The
14 California provision expressly states that if a hearsay statement is offered
15 under it during trial, “the court’s determination shall be made out of the
16 presence of the jury.”¹⁰⁰ The provision also gives guidance on what
17 procedure to use if the defendant elects to testify in connection with that
18 determination.¹⁰¹ The federal rule does not provide guidance on these
19 points.¹⁰²
- 20 • **Multiple Hearsay.** The California provision expressly states that if the
21 proffered statement “includes hearsay statements made by anyone other than
22 the declarant who is unavailable ..., those hearsay statements are
23 inadmissible unless they meet the requirements of an exception to the
24 hearsay rule.”¹⁰³ The federal rule includes no such language,¹⁰⁴ but the
25 general rule governing multiple hearsay would seem to apply.¹⁰⁵
- 26 • **Use of Proffered Statement in Determining Whether Exception Applies.**
27 The California provision and the federal rule also differ in the extent to
28 which they permit the court to consider the proffered statement in
29 determining whether the exception applies.¹⁰⁶

95. Evid. Code § 1350(a)(6).

96. *Id.*

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

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

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

100. Evid. Code § 1350(c).

101. *Id.*

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

103. Evid. Code § 1350(e).

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

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

106. See discussion of “Use of the Hearsay Statement in Determining Whether There Was Wrongdoing Warranting Forfeiture” *infra*.

1 In summary, California’s hearsay exception for forfeiture by wrongdoing is
2 narrower and incorporates more restrictions than the corresponding federal rule.
3 The many restrictions in the California provision “evince an abundance of caution
4 when abolishing the right of criminal defendants to object to hearsay even when
5 they have been charged with bringing about the hearsay declarant’s unavailability
6 as a witness.”¹⁰⁷

7 ***Other Jurisdictions***

8 Six states have adopted laws or court rules identical to the federal exception for
9 forfeiture by wrongdoing.¹⁰⁸ In addition to mirroring the language used in the
10 federal provision, several of these state provisions have comments that explicitly
11 say the state and federal provisions are identical.¹⁰⁹

12 Four other states have adopted provisions similar but not identical to the federal
13 exception: Connecticut,¹¹⁰ Michigan,¹¹¹ Ohio,¹¹² and Tennessee.¹¹³ Each of these

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

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

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

110. The Connecticut provision states:

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

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

...

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

111. The Michigan provision states:

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

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

...

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

112. The Ohio provision states:

Ohio R. Evid. 804(B) Hearsay exceptions

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

...

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

113. The Tennessee provision states:

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

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

....

1 states omits the reference to having “acquiesced in” wrongdoing;¹¹⁴ Michigan
2 substitutes a reference to having “encouraged” wrongdoing.¹¹⁵ Ohio requires the
3 proponent of the hearsay statement to give the adverse party advance notice of
4 intent to use the statement at trial.¹¹⁶

5 Three other states have provisions quite different from the federal exception. In
6 Hawaii, it is sufficient that a party “procured the unavailability of the declarant as
7 a witness.”¹¹⁷ Apparently, it is not necessary to show that the party intended to
8 procure the unavailability of the declarant.

9 Oregon draws a distinction between when a party intentionally or knowingly
10 engages in criminal conduct that causes death, incapacity, or incompetence of the
11 declarant, and when a party engages in, directs, or otherwise participates in
12 wrongful conduct that causes the declarant to be unavailable.¹¹⁸ In the latter
13 situation, the proponent of the hearsay statement must show that the declarant
14 intended to cause the declarant to be unavailable as a witness.¹¹⁹ Such proof is not
15 required in the former situation.¹²⁰

16 Finally, Maryland has two different hearsay exceptions for forfeiture by
17 wrongdoing, one for a civil case¹²¹ and the other for a criminal case.¹²² Both of

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

114. See *supra* notes 110-113.

115. See *supra* note 111.

116. See *supra* note 112.

117. The Hawaii provision states:

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

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

....

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

118. The Oregon provision states:

Or. Rev. Stat. § 40.465(3)

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

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

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

119. See *supra* note 118.

120. *Id.*

121. Maryland Rule 5-804(5), which deals with the forfeiture by wrongdoing provision in civil actions, provides:

Witness Unavailable Because of Party’s Wrongdoing

(A) Civil Actions. In civil actions in which a witness is unavailable because of a party’s wrongdoing, a statement that (i) was (a) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (b) reduced to writing and was signed by the declarant; or (c) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement, and (ii) is offered against a party who has

1 these exceptions are detailed and, like California's forfeiture by wrongdoing
2 exception, provide safeguards that are not present in the federal exception.¹²³

3 The remaining thirty-six states do not have a statute or court rule on forfeiture
4 by wrongdoing as an exception to the hearsay rule.¹²⁴ A few of these states have
5 recently investigated the possibility of adopting such a provision, but do not yet
6 appear to have done so.¹²⁵

engaged in, directed, or conspired to commit wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness, provided however the statement may not be admitted unless, as soon as practicable after the proponent of the statement learns that the declarant will be unavailable, the proponent makes known to the adverse party the intention to offer the statement and the particulars of it.

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

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

Hearsay evidence; witnesses unavailable due to wrongdoing

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

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

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

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

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

(1) The statement was:

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

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

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

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

(i) The intention to offer the statement;

(ii) The particulars of the statement; and

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

123. See *supra* notes 121 & 122.

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

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

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

1 **Forfeiture by Wrongdoing Exception to the Confrontation Clause**

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

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

10 Key case law on this point is discussed below.

11 *Early Decisions by the United States Supreme Court*

12 Although the Confrontation Clause generally gives a defendant the right to
13 confront an adverse witness, the United States Supreme Court has long recognized
14 an exception when the defendant has taken steps to prevent a witness from
15 testifying. As the Court explained in *Reynolds v. United States*,¹²⁶

16 The Constitution gives the accused the right to a trial at which he should be
17 confronted with the witnesses against him; but if a witness is absent by his own
18 wrongful procurement, he cannot complain if competent evidence is admitted to
19 supply the place of that which he has kept away. The Constitution does not
20 guarantee an accused person against the legitimate consequences of his own
21 wrongful acts. It grants him the privilege of being confronted with the witnesses
22 against him; but if he voluntarily keeps the witnesses away, he cannot insist on his
23 privilege. If, therefore, when absent by his procurement, their evidence is supplied
24 in some lawful way, he is in no condition to assert that his constitutional rights
25 have been violated.

26 The Court further explained that the forfeiture exception “has its foundation in the
27 maxim that no one shall be permitted to take advantage of his own wrong; and,
28 consequently, if there has not been, in legal contemplation, a wrong committed,

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

(5) Forfeiture by wrongdoing

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

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

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

126. 98 U.S. 145, 158 (1878).

1 the way has not been opened for the introduction of the testimony.”¹²⁷ In several
2 later cases, the Court mentioned the forfeiture exception, but did not provide much
3 more guidance on its contours.¹²⁸

4 *Recent Decisions by the United States Supreme Court*

5 When it decided *Crawford* in 2004, the Court made clear that the new approach
6 it took in that case did not negate the forfeiture exception to the Confrontation
7 Clause. After carefully distinguishing between hearsay exceptions that do and do
8 not “claim to be a surrogate means of assessing reliability,” the Court explained
9 that “the rule of forfeiture by wrongdoing (*which we accept*) extinguishes
10 confrontation claims on essentially equitable grounds; it does not purport to be an
11 alternate means of determining reliability.”¹²⁹

12 In *Davis*, the hearsay proponents and several amici contended that a testimonial
13 statement should be more readily admissible in a domestic violence case than in
14 other cases because that “particular type of crime is notoriously susceptible to
15 intimidation or coercion of the victim to ensure that she does not testify at trial.”¹³⁰
16 In responding to that contention, the Court did not establish a special rule
17 applicable to a testimonial statement in a domestic violence case. It did, however,
18 discuss the forfeiture exception to the Confrontation Clause in some detail:

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

27 We take no position on the standards necessary to demonstrate such forfeiture,
28 but federal courts using Federal Rule of Evidence 804(b)(6), which codifies the
29 forfeiture doctrine, have generally held the Government to the preponderance-of-
30 the-evidence standard. State courts tend to follow the same practice. Moreover, if
31 a hearing on forfeiture is required, [a Massachusetts case] observed that “hearsay
32 evidence, including the unavailable witness’s out-of-court statements, may be
33 considered.” The *Roberts* approach to the Confrontation Clause undoubtedly
34 made recourse to this doctrine less necessary, because prosecutors could show the
35 “reliability” of *ex parte* statements more easily than they could show the
36 defendant’s procurement of the witness’s absence. *Crawford*, in overruling

127. *Id.* at 159.

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

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

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

1 *Roberts*, did not destroy the ability of courts to protect the integrity of their
2 proceedings.

3 We have determined that, absent a finding of forfeiture by wrongdoing, the
4 Sixth Amendment operates to exclude Amy Hammon’s affidavit. The Indiana
5 courts may (if they are asked) determine on remand whether such a claim of
6 forfeiture is properly raised and, if so, whether it is meritorious.¹³¹

7 ***Recent Decision by the California Supreme Court***

8 A recent decision by the California Supreme Court provides further guidance on
9 the scope of the forfeiture by wrongdoing exception to the federal Confrontation
10 Clause. In *People v. Giles*,¹³² the defendant admitted killing his ex-girlfriend, but
11 he claimed to have acted in self-defense.¹³³ Over his objection, “the trial court
12 admitted the victim’s prior statements to a police officer who had been
13 investigating a report of domestic violence involving defendant and the victim.”¹³⁴
14 In those statements, the victim described an incident that allegedly occurred a few
15 weeks before the killing. She said that the defendant “had held a knife to her and
16 threatened to kill her.”¹³⁵

17 The Court concluded that the defendant “forfeited his confrontation clause
18 challenge to the victim’s prior out-of-court statements to the police.”¹³⁶ In reaching
19 that conclusion, the Court addressed a number of important issues.

20 First, the defendant argued that the forfeiture by wrongdoing exception to the
21 Confrontation Clause was inapplicable because there was no showing that the
22 defendant killed the victim “*with the intent of preventing her testimony* at a
23 pending or potential trial.”¹³⁷ The Court discussed this point at length and
24 ultimately concluded that it is not necessary to show an intent to prevent testimony
25 to invoke the forfeiture exception to the Confrontation Clause:

26 Although courts have traditionally applied the forfeiture rule to witness tampering
27 cases, forfeiture principles can and should logically and equitably be extended to
28 other types of cases in which an intent-to-silence element is missing. As the Court
29 of Appeal here stated, “Forfeiture is a logical extension of the equitable principle
30 that no person should benefit from his own wrongful acts. A defendant whose
31 intentional criminal act renders a witness unavailable for trial benefits from his
32 crime if he can use the witness’s unavailability to exclude damaging hearsay
33 statements by the witness that would otherwise be admissible. *This is so whether*

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

132. 40 Cal. 4th 833, 152 P.3d 433, 55 Cal. Rptr. 3d 133 (2007), *cert. granted*, 76 U.S.L.W. 3364, 3371 (U.S. Jan. 11, 2008) (No. 07-6053).

133. *Id.* at 837.

134. *Id.*

135. *Id.*

136. *Id.* at 855.

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

1 *or not the defendant specifically intended to prevent the witness from testifying at*
 2 *the time he committed the act that rendered the witness unavailable.*¹³⁸

3 Thus, the Court concluded it is enough to show that the witness is genuinely
 4 unavailable to testify and the defendant’s intentional criminal act caused that
 5 unavailability.¹³⁹

6 Second, the Court considered “whether the doctrine of forfeiture by wrongdoing
 7 applies where the alleged wrongdoing *is the same as the offense for which*
 8 *defendant was on trial.*”¹⁴⁰ In a classic witness tampering case, “the defendant is
 9 *not* on trial for the same wrongdoing that caused the forfeiture of his confrontation
 10 right, but rather for a prior underlying crime about which the victim was about to
 11 testify.”¹⁴¹ In *Giles*, however, the defendant was on trial for murder, the same
 12 wrongdoing that the prosecution pointed to in contending that the defendant had
 13 forfeited his right of confrontation. The argument against extending the forfeiture
 14 exception to such a situation is that “in ruling on the evidentiary matter, a trial
 15 court is required, in essence, to make *the same determination of guilt of the*
 16 *charged crime as the jury.*”¹⁴²

17 The Court rejected that argument, explaining that the presumption of innocence
 18 and right to jury trial will not be violated because the jury will not know of the
 19 judge’s preliminary finding and will use different information and a different
 20 standard of proof in deciding the defendant’s guilt.¹⁴³ Consistent with that
 21 conclusion, the Court made clear that the jury should not be informed of the
 22 judge’s preliminary finding that the defendant committed an intentional criminal
 23 act.¹⁴⁴

24 Third, the Court considered what standard applies in proving the facts necessary
 25 to invoke the forfeiture exception under the federal Confrontation Clause. The
 26 defendant argued that those facts must be proved by *clear and convincing*
 27 *evidence*. The Court disagreed. It noted that the “majority of the lower federal
 28 courts have held that the applicable standard necessary for the prosecutor to
 29 demonstrate forfeiture by wrongdoing is *by a preponderance of the evidence.*”¹⁴⁵
 30 The Court endorsed that standard, explaining that the Constitution only requires
 31 proof that it is more probable than not that the defendant procured the declarant’s
 32 unavailability.¹⁴⁶

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

139. *Id.* at 854.

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

141. *Id.* (emphasis added).

142. *Id.* (emphasis added).

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

144. *Id.* at 854.

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

146. *Id.* at 853.

1 Fourth, the Court discussed whether the proffered hearsay statement can be
2 considered in determining whether the forfeiture exception applies. The Court
3 concluded that the statement can be considered, subject to a limitation.
4 Specifically, the Court cautioned that “a trial court cannot make a forfeiture
5 finding based solely on the unavailable witness’s unopposed testimony; there
6 must be independent corroborative evidence that supports the forfeiture
7 finding.”¹⁴⁷

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

11 The forfeiture by wrongdoing doctrine, as adopted by us, only bars a
12 defendant’s objections under the confrontation clause of the federal Constitution
13 and does not bar statutory objections under the Evidence Code. Thus, even if it is
14 established that a defendant has forfeited his or her right of confrontation, the
15 contested evidence is still governed by the rules of evidence; a trial court should
16 still determine whether an unavailable witness’s prior hearsay statement falls
17 within a recognized hearsay exception and whether the probative value of the
18 proffered evidence outweighs its prejudicial effect. (Evid. Code, § 352.)¹⁴⁸

19 ***Justice Werdegar’s Concurrence***

20 Justice Werdegar, joined by Justice Moreno, concurred in the California
21 Supreme Court’s decision in *Giles*. She agreed with the majority that “the doctrine
22 of forfeiture by wrongdoing is not confined exclusively to witness-tampering
23 cases, in which a defendant commits malfeasance in order to procure the
24 unavailability of a witness,” but can also be applied “where defendant’s actions in
25 procuring a witness’s unavailability were the same actions for which he stood
26 trial.”¹⁴⁹ She criticized the Court, however, for addressing and resolving two
27 subsidiary questions that were unnecessary to disposition of the case before it.¹⁵⁰

28 In particular, Justice Werdegar noted:

- 29 • The Court “decides whether the prosecution, in order to use the victim’s
30 hearsay statements, must demonstrate the defendant’s wrongdoing by clear
31 and convincing evidence or only a preponderance of the evidence, despite
32 its implicit acknowledgment the issue is not implicated here because either
33 standard was satisfied.”¹⁵¹
- 34 • The Court “decides whether and to what extent the victim’s challenged
35 statements may be used in making this threshold showing of wrongdoing,

147. *Id.* at 854.

148. *Id.*

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

150. *Id.*

151. *Id.*

1 despite the fact, again, the evidence independent of [the victim’s] statements
2 makes it unnecessary to speak to this point.”¹⁵²

3 She explained that it was “unnecessary and unwise” to decide these issues because
4 they were not addressed by either of the lower courts, they were not included in
5 the grant of review and thus not fully briefed, and they required constitutional
6 analysis, which “should not be embarked on lightly and never when a case’s
7 resolution does not demand it.”¹⁵³

8 *Review by the United States Supreme Court*

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

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

17 In petitioning the Court to take the case, the defendant pointed out that lower
18 courts are sharply divided on this issue.¹⁵⁴ The petition also emphasized the
19 magnitude of the issue:

152. *Id.*

153. *Id.* at 856, 857.

154. See Petition for *certiorari* in *Giles*, p. 10; see also *United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005) (“There is no requirement that a defendant who prevents a witness from testifying against him through his own wrongdoing only forfeits the right to confront the witness where, in procuring the witness’s unavailability, he intended to prevent the witness from testifying.”); *Giles*, 40 Cal. 4th at 849 (“Although courts have traditionally applied the forfeiture rule to witness tampering cases, forfeiture principles can and should logically and equitably be extended to other types of cases in which an intent-to-silence element is missing.”); *People v. Moreno*, 160 P.3d 242, 247 (Colo. 2007) (“Because the People failed to prove that the defendant had any intent to prevent or dissuade the child from witnessing against him, the record fails to demonstrate that he forfeited his constitutional right to confront her.”); *People v. Stechly*, 225 Ill. 2d 246, 277, 870 N.E.2d 333, 312 Ill. Dec. 268 (Ill. 2007) (plurality) (“[W]e hold that the State must prove that the defendant intended by his actions to procure the witness’ absence to invoke the doctrine of forfeiture by wrongdoing.”); *State v. Meeks*, 277 Kan. 609, 614-16, 88 P.3d 789 (Kan. 2004) (without discussing whether defendant intended to prevent testimony, court finds defendant forfeited his right of confrontation by murdering victim), *overruled on other grounds*, *State v. Davis*, 283 Kan. 569, 158 P.3d 317 (Kan. 2006); *Commonwealth v. Edwards*, 444 Mass. 526, 540, 830 N.E.2d 158 (Mass. 2005) (“We hold that a defendant forfeits, by virtue of wrongdoing, the right to object to the admission of an unavailable witness’s out-of-court statements on both confrontation and hearsay grounds on findings that (1) the witness is unavailable; (2) the defendant was involved in, or responsible for, procuring the unavailability of the witness; and (3) the defendant acted with the intent to procure the witness’s unavailability.”); *State v. Fields*, 679 N.W.2d 341, 347 (Minn. 2004) (upholding district court’s forfeiture ruling because “the district court’s findings that Fields engaged in wrongful conduct, that he intended to procure the unavailability of Johnson and that the intentional wrongful conduct actually did procure the unavailability of Johnson, were not clearly erroneous.”); *State v. Romero*, 141 N.M. 403, 156 P.3d 694,

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

5 The expanded forfeiture rule has wide application because it makes forfeiture of
6 confrontation rights virtually automatic in every homicide case. For the first time,
7 an entire class of defendants has been stripped of the right to confrontation.

8 The expanded forfeiture rule also applies to cases where the witness could
9 testify but does not. Prosecutors have argued that the defendant forfeits the right
10 to confrontation whenever the witness's absence is due to the trauma of the
11 criminal act. Domestic violence and sexual abuse cases can present the situation.
12 Thus, once there is plausible evidence that the defendant is responsible for the
13 traumatizing crime, the victim's testimonial hearsay would be admitted. This is so
14 even though a witness may have independent, personal, and sometimes self-
15 serving reasons for not appearing, such as concerns about privacy, possible self-
16 incrimination, prior inconsistent statements, or the desirability of preserving pre-
17 existing relationships.¹⁵⁵

18 Another petition simultaneously raised the same issue, but from the perspective
19 of the prosecution, which had lost on the issue in the New Mexico Supreme
20 Court.¹⁵⁶ That petition also emphasized the magnitude of the issue, but described
21 the situation quite differently from the *Giles* petition:

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

25 The influence of lawless force directed toward parties or
26 witnesses to proceedings during their pendency is so sinister and
27 undermining of the process of adjudication itself that no court
28 should regard it with indifference or shelter it from exposure and
29 inquiry. The remedies of the law are substitutes for violence, not
30 supplements to violence[.]

703, *cert. dismissed*, ___ S.Ct. ___, 2008 WL 114456 (Jan. 11, 2008) (No. 07-37) (“[W]e reaffirm our holding in *Alvarez-Lopez* that the prosecution is required to prove intent to procure the witness’s unavailability in order to bar a defendant’s right to confront that witness.”); *State v. Mason*, 160 Wash. 2d 910, 926, 162 P.2d 396 (2007) (“Specific intent to prevent testimony is unnecessary. Knowledge that the foreseeable consequences of one’s actions include a witness’ unavailability at trial is adequate to conclude a forfeiture of confrontation rights.”); *State v. Mechling*, 219 W.Va. 366, 326, 633 S.E.2d 311 (W.Va. 2006) (“In order for forfeiture to be proven in domestic violence actions, prosecutors, law enforcement officers and courts must secure evidence — possibly from third parties — prior to trial, indicating that these victims are too frightened to testify about the intimidating and coercive character of the accused’s actions.”); *State v. Jensen*, 299 Wis. 2d 267, 272, 727 N.W.2d 518, 2007 WI 26 (Wisc. 2007) (“Today, we explicitly adopt this doctrine whereby a defendant is deemed to have lost the right to object on confrontation grounds to the admissibility of out-of-court statements of a declarant whose unavailability the defendant has caused.”).

155. Petition for *certiorari* in *Giles*, pp. 15-16 (citations omitted).

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

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

4 [B]y rewarding the intimidation and even murder of witnesses, the New Mexico
5 Supreme Court’s decision can only have the unintended effect of encouraging
6 those practices. It is difficult to conceive of any result more sadly perverse than
7 that.¹⁵⁷

8 In January 2008, the Court granted the petition in *Giles* and set a briefing
9 schedule.¹⁵⁸ Oral argument will be heard in April and the Court is expected to
10 issue its decision by the end of June.

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

13 Due to *Crawford* and the restrictions it has placed on introduction of a
14 testimonial statement, there has been debate over whether to change California’s
15 approach to forfeiture by wrongdoing.¹⁵⁹ The concern is that California’s hearsay
16 rule exception for forfeiture by wrongdoing appears to be narrower than the
17 constitutional exception for forfeiture by wrongdoing, and thus a testimonial
18 statement that would be admissible under the constitutional exception might still
19 be excluded under the hearsay rule in California.

20 In August 2007, the Senate Committee on Judiciary asked the Law Revision
21 Commission to study forfeiture by wrongdoing, particularly whether California
22 should adopt a hearsay rule exception that tracks the constitutional minimum as
23 articulated by the California Supreme Court in *Giles*.¹⁶⁰ The Commission has since
24 followed its usual procedure in conducting the requested study: holding a series of
25 public meetings, preparing a tentative recommendation, posting the tentative
26 recommendation to the Commission’s website and broadly circulating it for
27 comment, considering the comments on the tentative recommendation, and then
28 drafting a final recommendation for printing and submission to the Legislature.
29 Due to the deadline of March 1, 2008, the Commission had to accelerate this
30 process, completing each step more quickly than usual.

31 From the outset, the Commission was concerned about the lack of guidance
32 from the United States Supreme Court on key issues relating to forfeiture of the
33 constitutional right of confrontation, particularly on the divisive issue of whether it

157. Petition for *certiorari* in *Romero*, p. 14 (citation omitted).

158. The petition for *certiorari* in *Romero* was dismissed on motion of the petitioner. See *supra* note 156.

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

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

1 is necessary to prove that the defendant intended to prevent testimony.¹⁶¹ The
2 Commission's study thus explored four different possibilities:

- 3 (1) Repeal California's existing provision on forfeiture by wrongdoing and
4 replace it with a provision that tracks the constitutional minimum as
5 articulated by the California Supreme Court.
- 6 (2) Replace the existing provision with one similar to the federal rule.
- 7 (3) Broaden the existing provision to some extent.
- 8 (4) Leave the law alone.

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

15 After the Court decides *Giles*, much more information will be available than at
16 present, both on the permissible constitutional parameters and on the relevant
17 policy considerations. The Legislature will have the benefit not only of the Court's
18 opinion, but also any concurring or dissenting opinions, the briefs filed by the
19 parties and any amici, and the wealth of scholarly writings that are likely to be
20 generated as the case is pending and upon issuance of the Court's decision. The
21 Legislature should wait for that information before assessing how to proceed.¹⁶²
22 This is not only the Commission's recommendation, but also the advice of many
23 of the participants in the Commission's study.¹⁶³

24 Once the Court decides *Giles*, the Legislature should fully consider the merits of
25 the various approaches to forfeiture by wrongdoing as an exception to the hearsay

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

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

163. See Commission Staff Memorandum 2007-54, Exhibit p. 1 (comments of California Public Defenders Ass'n & Los Angeles Public Defender's Office); Commission Staff Memorandum 2007-41 (Oct. 23, 2007), Exhibit p. 1 (comments of Prof. Capra); Second Supplement to Commission Staff Memorandum 2007-41 (Oct. 23, 2007), Exhibit p. 4 (comments of Prof. Friedman); Third Supplement to Commission Staff Memorandum 2007-41 (Oct. 23, 2007), Exhibit p. 1 (comments of Prof. Flanagan). At the Commission meeting on January 17, 2008, the California District Attorneys Association and the Los Angeles City Attorney's Office also took the position that the Legislature should wait until *Giles* is decided before enacting any legislation on forfeiture by wrongdoing.

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

1 rule, and then determine which approach would best serve the citizens of
2 California. To assist the Legislature in this endeavor, the remainder of this report
3 provides information about the approaches considered by the Commission, and
4 gives some general suggestions regarding how the Legislature should proceed.

5 **Approaches Considered by the Commission**

6 Each approach considered by the Commission is described and discussed below.
7 At this time, the Commission makes no recommendation on which approach
8 would be the best long-term solution. The approaches are discussed in the order in
9 which they were initially presented for Commission consideration.¹⁶⁴ The
10 Commission has not ranked them in any manner.

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

13 The hearsay rule exception provided by Evidence Code Section 1350 is much
14 narrower than the forfeiture exception to the federal Confrontation Clause as
15 described by the California Supreme Court in *Giles*. If the California Supreme
16 Court's constitutional analysis is correct, admission of a hearsay statement might
17 be constitutionally acceptable, yet the statement might still be subject to exclusion
18 under the hearsay rule because it fails to satisfy the more stringent admissibility
19 requirements of Section 1350.

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

- 25 • The exception would apply when a party offers evidence of a statement
26 made by a declarant who is unavailable to testify.
- 27 • The evidence must be offered against a party whose intentional criminal act
28 caused the declarant to be unavailable to testify. It would not be necessary to
29 show that the party intended to prevent the declarant from testifying.
- 30 • Such misconduct must be proved to the court by a preponderance of the
31 evidence.
- 32 • The court would be permitted to consider the declarant's statement in
33 determining whether the party against whom it is offered engaged in an
34 intentional criminal act that caused the declarant to be unavailable to testify.
- 35 • The declarant's statement could not be the sole basis for finding that the
36 party against whom it is offered engaged in an intentional criminal act that
37 caused the declarant to be unavailable to testify. There must be some
38 independent corroborating evidence.

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

- 1 • The intentional criminal act that caused the declarant’s unavailability could
2 be the same act charged in the underlying case or it could be a different act.
- 3 • In a jury trial, the admissibility of the evidence must be determined outside
4 the presence of the jury. The jury shall not be informed of the court’s
5 finding.¹⁶⁵

6 Many comments indicated that such an approach would be premature absent
7 guidance from the United States Supreme Court on the constitutional minimum,
8 especially on whether such an exception could constitutionally be invoked against
9 a criminal defendant without proof that the defendant intended to prevent the
10 declarant from testifying.¹⁶⁶ Comments on the merits of this approach were mixed.

11 Prosecutors who commented strongly favor the approach.¹⁶⁷ They pointed out
12 that witnesses are often eliminated, intimidated, or otherwise deterred or prevented
13 from testifying, particularly in gang cases, homicides, and domestic violence
14 cases.¹⁶⁸ This impedes prosecutions.¹⁶⁹ If a defendant engages in an intentional

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

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

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

(1) The declarant is unavailable as a witness.

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

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

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

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

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

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

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

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

166. See *supra* note 162.

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

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

169. *Id.*

1 criminal act that causes a witness to be unavailable, the defendant may benefit
2 from that conduct by escaping conviction.¹⁷⁰ The prosecutors maintained that such
3 misconduct can and should be deterred by allowing out-of-court statements by the
4 unavailable witness to be introduced against the defendant.¹⁷¹ They believe that
5 proving the defendant's misconduct caused the witness' unavailability should be a
6 sufficient basis for admissibility, without the additional burden of having to prove
7 the defendant intended to silence the witness, which they consider overly difficult
8 to meet.¹⁷² In their view, adopting this approach will help to save witness' lives
9 and ensure that criminals are brought to justice.¹⁷³

10 In law reviews and other legal commentary, a number of scholars have taken a
11 similar position.¹⁷⁴ Two of these scholars, Prof. Richard Friedman and Prof.
12 Deborah Tuerkheimer, submitted comments to that effect.¹⁷⁵

13 Public defenders strongly oppose the concept of enacting a hearsay exception
14 that tracks the constitutional minimum as articulated by the California Supreme
15 Court in *Giles*.¹⁷⁶ They point out that people do not always tell the truth and
16 hearsay evidence, as compared to live testimony, is intrinsically inferior proof.¹⁷⁷
17 They say that adopting the *Giles* approach would thus lead to the introduction of
18 unreliable evidence, which defendants would be unable to effectively challenge
19 through cross-examination.¹⁷⁸ They warn that this will impede the truth-finding

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

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

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

173. *Id.* at Exhibit p.8.

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

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

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

177. *Id.*

178. *Id.*

1 process and cause innocent people to be wrongfully convicted and punished.¹⁷⁹ In
2 their view, the admissibility of hearsay evidence should not be liberalized without
3 demonstrating an unequivocal need for reform, supported by empirical evidence,
4 which has not been provided in this context.¹⁸⁰

5 Some scholars have likewise criticized the notion of a broad hearsay exception
6 for forfeiture by wrongdoing, which does not require proof that the defendant
7 intended to prevent the declarant from testifying.¹⁸¹ In the Commission's study,
8 Prof. Miguel Méndez favorably discussed the intent-to-silence limitation and
9 suggested that even if the United States Supreme Court does not impose such a
10 limitation as a matter of constitutional law, the California Legislature should
11 consider doing so.¹⁸² Prof. Gerald Uelmen warned that if California adopts a
12 hearsay exception based on the California Supreme Court's approach in *Giles*, that
13 would undermine the presumption of innocence in a murder case.¹⁸³ He explained
14 that under the *Giles* approach, virtually every statement by a homicide victim
15 would be admissible, because the defendant is accused of unlawfully rendering the
16 victim unavailable, and *Giles* would only require the prosecution to support that
17 accusation by a preponderance of the evidence at a foundational hearing.¹⁸⁴
18 Similarly, Prof. Daniel Capra reported that a group of federal judges expressed
19 concern that the practical effect of eliminating the intent requirement would be to
20 convict the defendant by a preponderance of the evidence.¹⁸⁵

21 In the same vein, Prof. Jeffrey Fisher cautioned that eliminating the intent-to-
22 silence requirement might essentially mean that there is no right to cross-examine
23 the victim in a domestic violence or child abuse case.¹⁸⁶ His concern is that courts
24 will conclude the very nature of domestic violence or child abuse makes the victim
25 afraid to testify and thereby triggers forfeiture.¹⁸⁷ Prof. James Flanagan shares this

179. *Id.*

180. *Id.*

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

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

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

184. *Id.*

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

186. *Id.*

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

1 concern about exemption of categories of cases from the right of cross-
2 examination.¹⁸⁸

3 Prosecutor organizations commented that this concern is misplaced.¹⁸⁹ Among
4 other things, they pointed out that a judge may exclude a victim's statement on
5 grounds other than the hearsay rule, such as by exercising discretion to exclude
6 evidence that is more prejudicial than probative.¹⁹⁰ They also noted that this
7 discretionary power can serve as a safeguard against introduction of unreliable
8 evidence.¹⁹¹

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

- 14 • Whether the hearsay exception for forfeiture by wrongdoing should include
15 a requirement that the proffered statement was made under circumstances
16 that indicate its trustworthiness.¹⁹²
- 17 • Whether it would be good policy to differentiate between a dead declarant
18 and a live one, requiring proof of intent-to-silence if the declarant is alive
19 but not if the declarant is dead.¹⁹³

188. *Id.*

189. Commission Staff Memorandum 2008-2 (Jan. 15, 2008), Exhibit pp. 1-2 (comments of California District Attorneys Ass'n & Los Angeles City Attorney's Office). For additional analysis of the hypotheticals discussed in this comment, see Commission Staff Memorandum 2008-2 (Jan. 15, 2008), pp. 4-6; First Supplement to Commission Staff Memorandum 2008-2 (Feb. 1, 2008), Exhibit pp. 5-6 (comments of Prof. Méndez).

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

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

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

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

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

- 1 • Whether to permit a judge to consider the proffered statement in
 2 determining whether the exception applies, which would be a deviation from
 3 California’s longstanding rule that a judge can only consider admissible
 4 evidence in resolving a foundational fact dispute.¹⁹⁴
- 5 • Whether to draw any distinction between a civil case and a criminal case in
 6 drafting the exception.¹⁹⁵
- 7 • Whether to clarify the concept of causation, such as by specifying that the
 8 declarant’s unavailability must be a foreseeable result of the wrongful act,
 9 that the wrongful act need not be the sole cause of the declarant’s
 10 unavailability, or that the wrongful act must be a “but for” cause of the
 11 declarant’s unavailability.¹⁹⁶
- 12 • Whether the exception should apply when a party acquiesces in an
 13 intentional criminal act that causes a declarant’s unavailability, or only when

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

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

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

In contrast to the Federal Rules of Evidence, the Evidence Code does not permit a court to consider inadmissible evidence in determining a preliminary question of admissibility. See Fed. R. Evid. 104(a) advisory committee’s note (California does not allow judge to consider inadmissible evidence in determining admissibility); Méndez Treatise, *supra* note 11, at 598-99 (same); J. Friedenthal, *Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code 6-7* (1976) (on file with the Commission) (same). Compare Tentative Recommendation and a Study relating to *The Uniform Rules of Evidence: Article 1. General Provisions*, 6 Cal. L. Revision Comm’n Reports 1, 19-21 (1964) (proposing provision that would generally permit judge to consider inadmissible evidence in determining preliminary fact that affects admissibility) with Evidence Code Section 402 (mirroring proposed provision in some respects, but omitting language that would generally permit judge to consider inadmissible evidence in determining preliminary fact that affects admissibility).

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

195. Maryland has two separate forfeiture exceptions: one for a civil case and the other for a criminal case. See *supra* notes 121-23.

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

1 a party engages in an intentional criminal act that causes a declarant's
2 unavailability.¹⁹⁷

- 3 • Whether to impose a duty to mitigate, such that an out-of-court statement is
4 inadmissible if the party proffering the statement failed to take reasonable
5 steps to afford the adverse party an opportunity for cross-examination.¹⁹⁸
- 6 • Whether the exception should expressly say whether a pretrial showing of
7 abuse, by itself, is sufficient to trigger forfeiture.¹⁹⁹
- 8 • Whether particular language needs to be included in the exception to ensure
9 that other objections to a statement, such as the declarant's lack of personal
10 knowledge or inclusion of multiple hearsay, are permitted.²⁰⁰

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

13 A second possibility would be to repeal Evidence Code Section 1350 and
14 replace it with a provision similar to Federal Rule of Evidence 804(b)(6).²⁰¹ That
15 could be done as follows:

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

17 1350. Evidence of a statement made by a declarant is not made inadmissible by
18 the hearsay rule if both of the following are true:

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

197. This issue has been raised primarily in the context of whether to adopt the federal approach to forfeiture by wrongdoing. See *infra* note 215. However, it also arises in the context of whether to codify the California Supreme Court's approach in *Giles*.

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

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

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

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

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

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

1 **Comment.** Section 1350 supersedes former Section 1350 (1985 Cal. Stat. ch.
2 783, § 1). The new provision is drawn from Federal Rule of Evidence 804(b)(6)
3 and Uniform Rule of Evidence 804(b)(5).

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

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

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

13 Several scholars expressed support for the approach. Prof. Capra said California
14 should adopt the federal approach to forfeiture by wrongdoing because
15 consistency at the federal and state levels would be desirable.²⁰² Prof. Méndez also
16 made favorable comments about the federal approach, particularly its intent-to-
17 silence limitation, although he did not directly endorse that approach.²⁰³

18 Prof. Uelmen commented that California should adopt the federal approach for
19 two reasons.²⁰⁴ First, he said the federal approach would be preferable to the *Giles*
20 approach because it would better serve the values underlying the hearsay rule: the
21 preference for testimony given under oath, subject to cross-examination, and in a
22 setting that permits the factfinder to observe the witness’ demeanor.²⁰⁵ Second, he
23 mentioned the importance of consistency and warned that forum shopping may
24 occur if California’s forfeiture by wrongdoing exception is broader than the
25 federal one.²⁰⁶

26 Both prosecutor and public defender groups criticized the federal approach. The
27 prosecutors said the approach is inadequate to address the problem of witness
28 intimidation, because it requires proof of intent-to-silence and such proof is almost
29 impossible to provide.²⁰⁷ Their understanding is that the federal exception is used
30 infrequently for exactly that reason.²⁰⁸

31 For example, they noted that in a battering situation, it may be difficult to
32 differentiate between a beating that is motivated by intent to intimidate the victim

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

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

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

205. *Id.*

206. *Id.* at Exhibit p. 15.

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

208. *Id.*

1 from testifying, and a beating that is motivated by other factors.²⁰⁹ They said that
2 in either situation, the likely result is that the victim is afraid to testify, fails to
3 appear at trial, and the batterer profits from wrongful conduct. They therefore
4 believe the forfeiture exception should apply regardless of the motivation for the
5 wrongful conduct.²¹⁰

6 Public defender groups gave different reasons for opposing the federal approach.
7 Writing before the United States Supreme Court agreed to hear *Giles*, they
8 stressed that there is much uncertainty regarding various forfeiture issues, so
9 adoption of the federal approach may not actually result in consistency between
10 the state and federal systems.²¹¹ They also warned that adopting the federal
11 approach would result in admission of unreliable evidence that would be excluded
12 under the current provision.²¹² They further maintained that the approach
13 exclusively benefits the prosecutor and thus unconstitutionally fails to provide
14 procedural reciprocity to a criminal defendant.²¹³

15 If the Legislature weighs the competing considerations and decides to pursue the
16 federal approach to forfeiture by wrongdoing, it would then be appropriate to
17 consider many of the same points mentioned above with respect to codifying the
18 California Supreme Court's approach in *Giles*.²¹⁴ In particular, concerns have been
19 raised regarding application of the federal exception to a party who acquiesces,
20 rather than engages, in wrongdoing that was intended to and did cause a declarant
21 to be unavailable.²¹⁵ In considering this and other points, the Legislature should

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

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

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

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

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

214. See *supra* notes 192-200 & accompanying text.

215. Prof. Flanagan did not take a position on the general concept of adopting the federal approach. But he pointed out that the term "acquiesce" is problematic because it includes not only a person who agrees to and encourages wrongdoing, but also a person who merely accepts the wrongdoing without agreeing to it. Third Supplement to Commission Staff Memorandum 1007-41 (Oct. 10, 2007), Exhibit p. 1; see also Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems With Federal Rule of Evidence 804(b)(6)*, 51 Drake L. Rev. 459, 498-526 (2003). Prof. Méndez also voiced concern about the term "acquiesce," but he has not elaborated. See Commission Staff Memorandum 2007-54 (Dec. 11, 2007), p. 15. Several states have not included the term "acquiesce" in their forfeiture exceptions. See *supra* notes 110-15, 117, 118, 121-22 & accompanying text. However, the California District Attorneys Association and Los Angeles City Attorney's Office see no problem with use of the term "acquiesce" and consider its inclusion necessary to successfully address the problem of witness intimidation. See *id.* at Exhibit p. 11.

1 bear in mind that deviating from the text of the federal rule will reduce the benefits
2 of consistency.

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

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

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

- 9 • **Type of Case in Which the Exception Applies.** Section 1350 applies only
10 in a criminal case charging a serious felony.²¹⁶ To discourage witness
11 tampering in all types of cases, the provision could be modified to apply in
12 any case, civil or criminal.
- 13 • **Party Against Whom the Exception May Be Invoked.** Section 1350 can
14 only be invoked against a criminal defendant.²¹⁷ The provision would be
15 more even-handed if it was modified to apply to any party.
- 16 • **Reason for the Declarant's Unavailability.** Section 1350 applies only
17 when the declarant's unavailability "is the result of the death by homicide or
18 the kidnapping of the declarant."²¹⁸ The Legislature could perhaps remove
19 that limitation.
- 20 • **Acquiescence in Wrongdoing that Results in the Declarant's**
21 **Unavailability.** Section 1350 applies only when "the declarant's
22 unavailability was knowingly caused by, aided by, or solicited by the party
23 against whom the statement is offered"²¹⁹ In contrast, under the federal
24 rule it is sufficient if a party has "acquiesced" in wrongdoing that was
25 intended to, and did, procure the unavailability of the declarant as a
26 witness.²²⁰ It would be possible to extend Section 1350 to acquiescence in
27 wrongdoing, like the federal rule.²²¹
- 28 • **Standard of Proof.** Section 1350 requires proof by clear and convincing
29 evidence.²²² If the United States Supreme Court says a lower standard of
30 proof would be constitutionally acceptable (such as preponderance of the
31 evidence), the Legislature could consider whether it would be good policy to
32 incorporate that standard in the statute.
- 33 • **Evidence that the Proponent of the Hearsay Statement Is Responsible**
34 **for the Declarant's Unavailability.** Section 1350 cannot be invoked if
35 there is "evidence that the unavailability of the declarant was caused by,

216. Evid. Code § 1350(a).

217. Evid. Code § 1350(a)(1).

218. *Id.*

219. *Id.*

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

221. *Bur* see *supra* note 215 & accompanying text.

222. Evid. Code § 1350(a)(1).

1 aided by, solicited by, or procured on behalf of, the party who is offering the
2 statement.”²²³ This safeguard against unreliable evidence might be worth
3 retaining.

- 4 • **Form of the Hearsay Statement.** Section 1350 applies only if the hearsay
5 statement “has been memorialized in a tape recording made by a law
6 enforcement official, or in a written statement prepared by a law
7 enforcement official and signed by the declarant and notarized in the
8 presence of the law enforcement official, prior to the death or kidnapping of
9 the declarant.”²²⁴ This is a strong safeguard against fabricated evidence. It so
10 severely limits application of the statute, however, that the provision may be
11 of little use. The Legislature could consider removing the requirement
12 altogether, or revising the statute to require that the hearsay statement be
13 memorialized in a recording or in a writing made at or near the time of the
14 statement.
- 15 • **Circumstances Under Which the Hearsay Statement Was Made.** Section
16 1350 can be invoked only if the hearsay statement “was made under
17 circumstances which indicate its trustworthiness and was not the result of
18 promise, inducement, threat, or coercion.”²²⁵ The Legislature could examine
19 the effect of these requirements and determine whether they are worth
20 retaining.
- 21 • **Relevance of the Hearsay Statement.** Section 1350 expressly requires that
22 the hearsay statement be relevant to the issues being tried.²²⁶ That language
23 is unnecessary due to the general prohibition on introducing irrelevant
24 evidence.²²⁷ The language should be deleted.²²⁸
- 25 • **Evidence Connecting the Defendant to Commission of the Serious
26 Felony Charged.** Under Section 1350, the proffered statement cannot be the
27 sole evidence that connects the defendant to the serious felony charged
28 against the defendant. Rather, the statement is admissible only if it “is
29 corroborated by other evidence which tends to connect the party against
30 whom the statement is offered with the commission of the serious felony
31 with which the party is charged.”²²⁹ Evidence that merely shows the
32 commission or circumstances of the offense is not sufficient
33 corroboration.²³⁰

34 This corroboration requirement focuses on connecting the defendant to the
35 crime charged. It is different from requiring corroboration of the
36 wrongdoing that results in forfeiture of a defendant’s right of confrontation.
37 It appears to be intended to promote reliability in determinations of whether

223. Evid. Code § 1350(a)(2).

224. Evid. Code § 1350(a)(3).

225. Evid. Code § 1350(a)(4).

226. Evid. Code § 1350(a)(5).

227. See Evid. Code § 350.

228. See *supra* notes 92-94 & accompanying text.

229. Evid. Code § 1350(a)(6).

230. *Id.*

1 the defendant, as opposed to someone else, committed the crime charged.
2 The Legislature could consider whether to continue such protection, and, if
3 so, whether to extend it to any criminal case, not just a case charging a
4 serious felony.

- 5 • **Notice of Intent to Invoke the Forfeiture by Wrongdoing Exception.**
6 Section 1350 requires the prosecution to notify the defendant ten days
7 before the prosecution offers a hearsay statement under the provision.²³¹
8 There is a good cause exception, but if good cause is shown the defendant is
9 entitled to a reasonable continuance.²³² This procedural requirement makes
10 sense and probably should be retained, but the language would require
11 modification if the statute were extended to all parties in all types of cases.
- 12 • **Procedure for Determining Whether the Exception Applies.** Section
13 1350 expressly states that if a hearsay statement is offered under it during
14 trial, “the court’s determination shall be made out of the presence of the
15 jury.”²³³ The provision also gives guidance on what procedure to use if a
16 defendant elects to testify in connection with that determination.²³⁴ This
17 guidance is useful and probably should be retained.
- 18 • **Multiple Hearsay.** Section 1350 expressly states that if the proffered
19 statement “includes hearsay statements made by anyone other than the
20 declarant who is unavailable ..., those hearsay statements are inadmissible
21 unless they meet the requirements of an exception to the hearsay rule.”²³⁵
22 That language might be unnecessary due to the general provision governing
23 multiple hearsay.²³⁶

24 Revisions such as those discussed above could be combined in a single
25 amendment.²³⁷

26 The concept of retaining Section 1350 but broadening it in some respects drew
27 no clear support. In part, this might have been because the Commission’s tentative
28 recommendation indicated that the reform could perhaps be a temporary measure,
29 pending further guidance from the United States Supreme Court on the
30 constitutional requirements.

31 Prof. Uelmen opposed the approach on the ground that it could lead to extended
32 statutory tinkering.²³⁸ He considers forfeiture an area of the law where trial courts
33 need certainty and clear guidance.²³⁹

231. Evid. Code § 1350(b).

232. *Id.*

233. Evid. Code § 1350(c).

234. *Id.*

235. Evid. Code § 1350(e).

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

237. See Appendix *infra*.

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

239. *Id.*

1 Public defender groups opposed the approach on the ground that it would invite
2 admission of unreliable evidence and thus lead to conviction of innocent people.²⁴⁰
3 In contrast, prosecutor groups opposed the approach on the ground that it would
4 not effectively address the problem of witness intimidation.²⁴¹

5 Prof. Flanagan did not take a position on whether Section 1350 should be
6 revised. He commented, however, that Section 1350 is a carefully drafted and
7 limited forfeiture exception.²⁴² He urged the Legislature to be cautious about
8 making any revisions, so as to avoid creating a situation in which hearsay evidence
9 is used in lieu of live testimony that could have been obtained.²⁴³ He also said that
10 if the Legislature revises the statute, it should seriously consider leaving certain of
11 its requirements intact, to safeguard against introduction of unreliable evidence.²⁴⁴

12 Although the concept of revising, rather than replacing or retaining, Section
13 1350 did not receive any support during the Commission's study, that could
14 change depending on what the United States Supreme Court decides in *Giles*. The
15 Legislature should evaluate the merits of the approach after the Court issues its
16 decision.

17 ***Option #4. Leave Evidence Code Section 1350 Alone***

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

22 Public defender groups commented that this would be the best option for
23 California.²⁴⁵ They believe it would best protect a defendant's constitutional right
24 to a fair trial and the truth-seeking process of the criminal justice system.²⁴⁶
25 Although they submitted these comments before the United States Supreme Court
26 agreed to hear *Giles*, and they stressed the uncertainty regarding the constitutional
27 constraints for forfeiture,²⁴⁷ it seems probable that they will take the same position
28 after the Court decides *Giles*.

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

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

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

243. *Id.*

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

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

246. *Id.*

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

1 Prof. Flanagan praised Section 1350 as carefully drafted,²⁴⁸ and other scholars
2 have expressed similar views in legal commentary.²⁴⁹ However, neither Prof.
3 Flanagan nor any other scholar who commented in the Commission’s study
4 expressed a clear preference for leaving Section 1350 alone.

5 Prosecutor groups opposed the idea for the same reason that they opposed the
6 concept of amending Section 1350. They view the statute as completely
7 ineffective in deterring witness intimidation.²⁵⁰

8 Prof. Uelmen also opposed the idea of leaving Section 1350 alone, but for a
9 different reason. He considers the intent-to-silence requirement important and
10 believes it is most likely to be preserved in the long-term if California adopts the
11 federal approach to forfeiture by wrongdoing.²⁵¹

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

16 **Selection of the Best Approach**

17 After the United States Supreme Court decides *Giles*, the Legislature will need
18 to examine the constitutional minimum and determine whether to codify that
19 minimum or deviate from it by providing additional statutory protection in one or
20 more respects. Its decision on this matter will have major implications for the
21 criminal justice system in California, and will also affect the civil justice system.
22 The Legislature should therefore proceed with care, engaging in thorough
23 deliberations and providing ample opportunity for input.²⁵² If additional analysis
24 from the Commission would be useful in this process, the Legislature could refer
25 the matter (or aspects of it) back to the Commission for further study after the
26 United States Supreme Court decides *Giles*. If the Legislature ultimately decides
27 to enact new legislation on forfeiture by wrongdoing, that legislation should
28 include a transitional provision, so as to prevent unnecessary litigation over
29 retroactivity of the reform.²⁵³

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

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

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

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

252. 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.*

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

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

1 In evaluating the possible statutory approaches, the Legislature should bear in
2 mind two overriding and competing policy interests. On the one hand, if a person
3 commits a wrongful act that causes a witness to be unavailable to testify, such
4 behavior interferes with the operation of the justice system and may enable the
5 person to evade justice. Under such circumstances, it may be appropriate to
6 deprive the person of the opportunity to object to an out-of-court statement by the
7 unavailable witness, so as to level the playing field that was distorted by the
8 person's misconduct.

9 On the other hand, an innocent person should not be punished for a criminal act
10 committed by another, nor should a person guilty of one crime (e.g.,
11 manslaughter) be found guilty of a more egregious crime (e.g., premeditated
12 murder). Likewise, it is important to achieve a just result in a civil case, not only
13 for the sake of the parties but also because an unfair outcome may undermine
14 public confidence in the justice system.²⁵⁴

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

23 Above all, any legislation on forfeiture by wrongdoing must comply with
24 constitutional constraints. Failure to do so would create a risk of overturned
25 convictions and concomitant problems. The Constitution of the United States is
26 "the supreme law of the land, and the judges in every state shall be bound thereby,
27 any thing in the ... laws of any state to the contrary notwithstanding."²⁵⁵

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

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

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

255. U.S. Const. art. VI, § 2.

PROPOSED LEGISLATION

Evid. Code § 240 (amended). Unavailable witness

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

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

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

(2) Disqualified from testifying to the matter.

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

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

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

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

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

(c) Expert testimony which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability. ~~The pursuant to paragraph (3) of subdivision (a). As used in this section, the term “expert” means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.~~

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

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

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

1 unavailing. *Francis*, 200 Cal. App. 3d at 584, 587; *Walker*, 145 Cal. App. 3d at 894; *Sul*, 122 Cal.
2 App. 3d at 365.

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

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

APPENDIX

1 The Commission's tentative recommendation included the following possible
2 amendment of Section 1350:

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

4 1350. (a) ~~In a criminal proceeding charging a serious felony, evidence~~ Evidence
5 of a statement made by a declarant is not made inadmissible by the hearsay rule if
6 the declarant is unavailable as a witness, and all of the following are true:

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

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

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

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

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

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

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

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

36 (c) If the statement is offered during a jury trial, the court's determination shall
37 be made out of the presence of the jury. If ~~the~~ a criminal defendant elects to testify
38 at the hearing on a motion brought pursuant to this section, the court shall exclude
39 from the examination every person except the clerk, the court reporter, the bailiff,

1 the prosecutor, the investigating officer, the defendant and his or her counsel, an
2 investigator for the defendant, and the officer having custody of the defendant.
3 Notwithstanding any other provision of law, the defendant's testimony at the
4 hearing shall not be admissible in any other proceeding except the hearing brought
5 on the motion pursuant to this section. If a transcript is made of the defendant's
6 testimony, it shall be sealed and transmitted to the clerk of the court in which the
7 action is pending.

8 ~~(d) As used in this section, "serious felony" means any of the felonies listed in~~
9 ~~subdivision (c) of Section 1192.7 of the Penal Code or any violation of Section~~
10 ~~11351, 11352, 11378, or 11379 of the Health and Safety Code.~~

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

15 **Comment.** Section 1350 is amended to broaden its application.

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

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

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

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

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

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

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

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

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

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

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

45 Tentative Recommendation on Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing
46 (Oct. 2007), pp. 38-40.