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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF _____

THE PEOPLE OF THE STATE OF CALIFORNIA **v.** Defendant	Case No.

I.
BENCH MEMO ON THE FORFEITURE BY WRONGDOING DOCTRINE AND HEARSAY EXCEPTION (EVIDENCE CODE SECTION 1390)

This bench memo is being provided to give this Court an overview of the various elements of doctrine of forfeiture by wrongdoing exception to the mandate of the Confrontation Clause and the hearsay exception of Evidence Code section 1390 which overlaps with the Confrontation Clause exception. It will discuss the case law developed in response to some of the common issues arising when seeking to apply the doctrine and section 1390.

I.
APPLICATION OF THE DOCTRINE OF FORFEITURE BY WRONGDOING TO OVERCOME A CONFRONTATION CLAUSE OBJECTION

The Confrontation Clause generally excludes testimonial hearsay unless the declarant of the hearsay is present for cross-examination or the defendant

had a prior opportunity to confront and cross-examine the declarant of the hearsay. (See *Giles* v. *California (*2008) 554 U.S. 353, 358 citing to *Crawford* v. *Washington* (2004) 541 U.S. 36, 68.) However, the High Court has long recognized an equitable doctrine that provides an exception to this general rule: the forfeiture by wrongdoing exception. (See *Reynolds* v. *United States* (1878) 98 U.S. 145.[1]

"Under the forfeiture by wrongdoing doctrine, a defendant forfeits his Sixth Amendment right to confront a witness against him when, by a wrongful act, the defendant makes the witness unavailable to testify at trial." (*People* v. *Quintanilla* (2020) 45 Cal.App.5th 1039, 1050 citing to *Giles* v. *California* (2008) 554 U.S. 353, 355.) The doctrine applies when the declarant's statement was made by a "witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant." (*Giles*, *supra*, at pp. 358, 359.) However, "unconfronted testimony will not be admitted under the forfeiture by wrongdoing doctrine 'without a showing that the defendant intended to prevent a witness from testifying.'" (*Quintanilla*, *supra*, at p. 1050 citing to *Giles*, at p. 361; accord *People* v. *Concepcion* (2008) 45 Cal.4th 77, 82, fn. 7.)

The High Court has said the doctrine is codified in the Federal Rules of Evidence, rule 804(b)(6) (28 U.S.C.), which allows forfeiture of confrontation "only when the defendant 'engaged or acquiesced in wrongdoing that was

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[1] In *Crawford* v. *Washington* (2004) 541 U.S. 36, the High Court altered the analysis a court must go through in deciding whether to admit a hearsay statement over a Confrontation Clause. Although, under *Crawford*, the test is now focused on whether the statement is testimonial and not on whether it is reliable or trustworthy, the High Court continued to accept the long-standing rule of forfeiture by wrongdoing which "extinguishes confrontation claims on essentially equitable grounds" and "does not purport to be an alternative means of determining reliability." (*Id.* at p. 62; see also *People* v. *Reneaux* (2020) 264 Cal.Rptr.3d 459, 474 (petition for review filed) [citing to *United States* v. *Ponzo* (1st Cir. 2017) 853 F.3d 558, 579 for the proposition that there is "no reason why pre-*Crawford* forfeiture-by-wrongdoing case law is not valid under *Giles*."].)

intended to, and did, procure the unavailability of the declarant as a witness.'" (*Giles*, at p. 367; *People* v. *Banos* (2009) 178 Cal.App.4th 483, 500.)

A. What is the Rationale Behind the Doctrine of Forfeiture by Wrongdoing?

The doctrine of forfeiture by wrongdoing confrontation has long been recognized as a mechanism to address the problem of a criminal defendant who tries to prevent witnesses from testifying against the defendant.

In *Davis* v. *Washington* (2006) 547 U.S. 813, the High Court explained the rationale behind the doctrine: "[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*: that 'the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds.'" (*Davis* at p. 833; see also *Giles* v. *California*, *supra*, 554 U.S. at p. 365 ["a defendant should not be permitted to benefit from his own wrong"].) Accordingly, "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." (*Davis, supra,* at p. 833.)

The goal of the doctrine is to remove the "otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them—in other words, it is grounded in 'the ability of the courts to protect the integrity of their proceedings.'" (*Giles* v. *California* (2008) 554 U.S. 353, 374; *People* v. *Reneaux* (2020) 264 Cal.Rptr.3d 459, 469 [petition for review filed]; *People* v. *Kerley* (2018) 23 Cal.App.5th 513, 550; *People* v. *Banos* (2009) 178 Cal.App.4th 483, 500.)

B. What Level of Proof is Required to Meet the Elements of the Doctrine?

The finding that the defendant intended to, and did procure, the unavailability of the witness need only be made by a preponderance of the evidence. (*People* v. *Zambrano* (2007) 41 Cal.4th 1082, 1147, fn. 21; *People* v. *Merchant* (2019) 40 Cal.App.5th 1179, 1185; *People* v. *Banos* (2009) 178 Cal.App.4th 483, 503, fn. 12; *Anderson* v. *State* (Nev. 2019) 447 P.3d 1072, 1076 [noting majority of courts use the preponderance standard].)

C. The Element of Engaging in Wrongdoing

To qualify as wrongdoing, the defendant's conduct must involve "*affirmative action on the part of the defendant that produces the desired result*, non-appearance by a prospective witness against him in a criminal case." (*People* v. *Reneaux*, *supra*, 264 Cal.Rptr.3d 459, 472–473; *Carlson* v. *Attorney General of California* (9th Cir. 2015) 791 F.3d 1003, 1009-1010; *Anderson* v. *State* (Nev. 2019) 447 P.3d 1072, 1077 [and noting a line must be drawn "between a defendant's mere passive acquiescence in a witness's decision to be absent and a defendant's affirmative effort or collusion with a witness to procure that witness's absence"].)

However, the "standard of wrongdoing is broad." (*People* v. *Reneaux*, *supra*, 264 Cal.Rptr.3d at p. 473.) And whether the conduct constitutes wrongdoing must be considered with "the underlying purpose to prevent defendant from undermining the judicial process" in mind. (*Id*. at p. 473; see also *State* v. *Hallum* (2000) 606 N.W.2d 351, 356 ["it is the fact that a defendant's conduct interferes with the interest in having witnesses testify at a public trial that makes the defendant's conduct wrongful"].)

"The defendant's affirmative action need not be criminal or even threatening. Rather, the action becomes 'wrongdoing' because the defendant acted with the intent to interfere with the court's truth-finding function and his

action caused the witness not to appear." (*People* v. *Reneaux*, *supra*, 264 Cal.Rptr.3d at p. 473; *Commonwealth* v. *Rosado* (Mass. 2018) 106 N.E.3d 651, 657 ["'A defendant's involvement in procuring a witness's unavailability need not consist of a criminal act' -- the 'wrongdoing' in the doctrine of forfeiture by wrongdoing is simply the intentional act of making the witness unavailable to testify or helping the witness to become unavailable."]; *Commonwealth*. v. *Szerlong* (Mass 2010) 933 N.E.2d 633, 638-639 [same]; *State* v. *Hallum* (2000) 606 N.W.2d 351, 356 ["the nature of the defendant's conduct is not as important as the effect of that conduct on the witness's willingness to testify at trial."];see also *Lopez* v. *State* (Ga. Ct. App. 2020) 844 S.E.2d 195, 199 [wrongdoing consisted simply of pressuring witness with "the notion that she did not have to comply with the subpoena to appear for trial and by repeatedly telling her that the State would not be able to proceed with the case without her"]; Fed.R.Evid. 804, Notes of Advisory Committee on Rules—1997 Amendments. ["The wrongdoing need not consist of a criminal act."].)

"The theory of the cases appears to be that the disclosure of relevant information at a public trial is a paramount interest, ***and any significant interference with that interest, other than by exercising a legal right to object at the trial itself, is a wrongful act.***" (*People* v. *Reneaux*, *supra*, 264 Cal.Rptr.3d at p. 473, emphasis added, citing to *Steele* v. *Taylor* (6th Cir. 1982) 684 F.2d 1193, 1201; accord *United States* v. *Gray* (4th Cir. 2005) 405 F.3d 227, 242; *State* v. *Maestas* (N.M. 2018) 412 P.3d 79, 88; *State* v. *Hallum* (Iowa 2000) 606 N.W.2d 351, 356; see also *Cody* v. *Commonwealth* (Va. Ct. App. 2018) 812 S.E.2d 466, 482 ["conduct by a defendant that is intended to prevent a witness from testifying and successfully results in a witness being unable or unwilling to do so, satisfies the requirements for application of the doctrine of forfeiture by wrongdoing"]; *Commonwealth* v. *Rosado* (Mass. 2018) 106 N.E.3d 651, 657 ["the 'wrongdoing' in the doctrine of forfeiture by wrongdoing is simply the intentional act of making the witness unavailable to testify or helping the

witness to become unavailable."]; *State* v. *Franklin* (Ariz. Ct. App. 2013) 307 P.3d 983, 987 ["any form of witness tampering can constitute a 'wrongdoing' for purposes of invoking the forfeiture exception under Rule 804(b)(6)"] and *People* v. *Pappalardo* (N.Y. Sup. Ct. 1991) 152 Misc.2d 364, 369 ["the specific method used by a defendant to keep a witness from testifying is not determinative"].)[2]

Indeed, "[w]hether a defendant's conduct constitutes 'wrongdoing' depends not necessarily on its character, but on the defendant's intent and whether his actions caused the witness not to appear." (*People* v. *Reneaux*, *supra*, 264 Cal.Rptr.3d at p. 471; see also *Scott* v. *State* (Ind. Ct. App. 2020) 139 N.E.3d 1148, 1155 ["forfeiture by wrongdoing doctrine applies when the defendant engages in conduct designed to prevent the witness from testifying, regardless of its severity"].)

"Wrongful conduct obviously includes the use of force and threats . . .". (*People* v. *Reneaux*, *supra*, 264 Cal.Rptr.3d at p. 473.) But the wrongdoing need not be "explicitly threatening or directive." (*Id.* at p. 471.)

Wrongdoing can "include persuasion and control by a defendant, the wrongful nondisclosure of information, and a defendant's direction to a witness to exercise the fifth amendment privilege." (*Id.* at pp. 473-474; *Steele* v. *Taylor* (6th Cir. 1982) 684 F.2d 1193, 1201; *Commonwealth* v. *Edwards* (Mass. 2005)

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[2] In the case of *United States* v. *Scott* (7th Cir. 2002) 284 F.3d 758, the court stated that "causing a person not to testify at trial cannot be considered the "wrongdoing" itself, otherwise the word would be redundant." (*Id.* at p. 763.) It is not entirely clear what the court meant in so stating; but it is likely a reference to the fact that causing a person not to testify cannot be considered in a vacuum (i.e., absent consideration of the person's intent and surrounding circumstances) as evidenced by the discussion in *Scott* following that statement. In the very next sentence, the court stated: "So we must focus *on the actions* procuring the unavailability." And then explained, the doctrine "contemplates application against the use of coercion, undue influence, or pressure to silence testimony and impede the truth-finding function of trials. We think that applying pressure on a potential witness not to testify, including by threats of harm and suggestions of future retribution, is wrongdoing." (*Id.* at p. 764.)

830 N.E.2d 158, 165, fn. 16; *State* v. *Hallum* (Iowa, 2000) 606 N.W.2d 351, 356; accord *United States* v. *Gray* (4th Cir. 2005) 405 F.3d 227, 242; see also *United States* v. *Scott* (7th Cir. 2002) 284 F.3d 758, 764 [wrongdoing "contemplates application against the use of coercion, undue influence, or pressure to silence testimony and impede the truth-finding function of trials"].)

"Depending on the facts, trial strategies, letters and phone calls from jail colluding or confirming that a witness will not appear, and even a marriage proposal may constitute wrongdoing for purposes of the forfeiture-by-wrongdoing doctrine if the defendant engaged in those actions with the intent to prevent the witness from testifying." (*People* v. *Reneaux*, *supra*, 264 Cal.Rptr.3d at pp. 473-474; see also *Commonwealth*. v. *Szerlong* (Mass 2010) 933 N.E.2d 633, 638-639 ["Forfeiture by wrongdoing may include a defendant's collusion with a witness to ensure that the witness will not be heard at trial. The Commonwealth need not show that the defendant threatened, coerced, persuaded, or pressured a witness to avoid testifying, or physically prevented the witness from testifying."].)

Cajoling but nonthreatening behavior, such as "exhortations to stop lying and to reveal false reports previously given, and to expressions of love and desire" can qualify, especially when the conduct occurs "in the context of domestic violence offenses and abusive relationships." (*People* v. *Reneaux*, *supra*, 264 Cal.Rptr.3d at p. 471; this bench memo, *supra*, at pp. 12-14.)

It is not necessary that defendant be the direct perpetrator of the wrongdoing. It is sufficient if a defendant "uses an intermediary for the purpose of making a witness absent." (*Giles* v. *California*, *supra*, 554 U.S. at 360; *State* v. *Hernandez* (Wash. Ct. App. 2016) 368 P.3d 500, 505; accord *People* v. *Jones* (Mich. Ct. App. 2006) 714 N.W.2d 362, 370.)

Here is a partial list of the types of conduct that have qualified as wrongdoing for purposes of applying the doctrine:

Killing of the witness (see e.g., *Giles* v. *California*, *supra*, 554 U.S. at p. 356 *People* v. *Kerley*, *supra*, 23 Cal.App.5th at pp. 556-557; *People* v. *Banos*, *supra*, 178 Cal.App.4th at p. 485)

Bribing the witness (see e.g., *United States* v. *Jonassen* (7th Cir. 2014) 759 F.3d 653, 662; *Carr* v. *State* (Ind. Ct. App. 2018) 106 N.E.3d 546, 553; *People* v. *Geraci* (1995) 85 N.Y.2d 359, 369)[3]

Express or implied threats to harm the victim if the victim testifies (see *People* v. *Jones* (2012) 207 Cal.App.4th 1392, 1398-1399[4]; *People* v. *Merchant* (2019) 40 Cal.App.5th 1179, 1185;[5] *Hendrix* v. *State* (Ga. 2018) 813 S.E.2d 333, 341-342[6])

Coercive cajoling, intimidation, and/or psychological manipulation (see *People* v. *Reneaux, supra*, 264 Cal.Rptr.3d at pp. 469-472[7]; *United States* v. *Jonassen* (7th Cir. 2014) 759 F.3d 653, 662[8] [both]; *United States* v. *Carlson* (8th Cir. 1976) 547 F.2d 1346, 1358-1359 [intimidation])

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[3] In all three of these cases, the bribery was accompanied by other types of wrongdoing. (See *Jonassen* at p. 662 and this bench memo, at fn. 8; *Carr* at p. 553 and this bench memo at p. 24 and fn. 11; *Geraci* at p. 370.)

[4] Discussed in this bench memo, *supra*, at p. 15.

[5] Discussed in this bench memo, *supra*, at pp. 14-15.

[6] In *Hendrix*, the defendant sent the witness (his grandmother) a note calling her a "snitch" and screamed at her repeatedly not to talk when she was placed in interview room, causing the witness to believe she would be killed if she refused to show up for defendant's trial. Ultimately, after the witness was brought in on arrest warrant, the defendant again confronted her with irate admonitions at the courthouse, and she became uncooperative on witness stand, claiming a lack of memory. (*Id*. at pp. 341-342.)

[7] *Reneaux* is discussed at length in this bench memo at pp. 12-14.

[8] In *Jonassen*, the defendant kidnapped his 21-year old daughter and sexually assaulted her. The defendant engaged in "incessant pretrial manipulation" to render his daughter, who has long been subjected to abuse by the defendant and susceptible to manipulation, unavailable. The Seventh Circuit upheld admission

Violation of a court order (see *United States* v. *Jonassen* (7th Cir. 2014) 759 F.3d 653, 662[9]; *United States* v. *Montague* (10th Cir. 2005) 421 F.3d 1099, 1104[10]; *Carr* v. *State* (Ind. Ct. App. 2018) 106 N.E.3d 546, 553[11]; *Cody* v. *Commonwealth* (Va. Ct. App. 2018) 812 S.E.2d 466, 482)[12]

Colluding or conspiring with a witness to make the witness unavailable by, inter alia, causing or helping the witness to go into hiding (see *Reynolds* v. *United States* (1878) 98 U.S. 145;[13] *Anderson* v. *State* (Nev. 2019) 447 P.3d 1072, 1077;[14] *Commonwealth* v. *Edwards* (Mass. 2005) 830 N.E.2d 158 [cited with approval in

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of the daughter's statements, noting defendant's contacts were in violation of a court order, that the defendant worked "tirelessly for seven months to persuade [the victim] to recant," bombarded her "with phone calls, letters, and messages delivered through several family members" and used tactics from offering bribes to pleas for sympathy such as playing upon the victim's sense of guilt by complaining in graphic detail about being sexually assaulted and malnourished in jail. (*Id*. at p. 662.)

[9] In *Jonassen*, the bribery was accompanied by other types of wrongdoing. See this bench memo, at fn. 4.

[10] In *Montague*, the violation of a court order was accompanied by other types of wrongdoing. (*Id*. at pp. 1103-1104.)

[11] In *Carr*, the violation of the court order was accompanied by other types of wrongdoing. (*Id*. at pp. 553; see this bench memo, *supra*. at fn. 3 and, *infra*, at p. 24.

[12] In *Cody*, the defendant repeatedly violated a court order by contacting the witness and telling her that she should drop the charges, that she should not come to court, and that she did not have to come to court. (*Id*. at p. 473.)

[13] In *Reynolds*, the defendant kept his wife away from home so that she could not be subpoenaed to testify. (*Id*. at pp. 148-150; cf., *People* v. *Pearson* (2008) 165 Cal.App.4th 740 [forfeiture by wrongdoing by concealing witness, as estoppel to invoke double jeopardy].)

[14] In *Anderson*, the wrongdoing consisted of defendant telling his daughter "to disappear for a week" and "to leave [her] phone and go someplace else" so that authorities could not track her. (*Id*. at p. 1077.)

People v. *Reneaux, supra*, 264 Cal.Rptr.3d at pp. 474-475]; *Commonwealth* v. *Rosado* (Mass. 2018) 106 N.E.3d 651, 657)

Colluding or conspiring with a witness to make the witness unavailable by, inter alia, hiring an attorney to represent the witness (see *Steele* v. *Taylor* (6th Cir. 1982) 684 F.2d 1193)[15]; see also *United States* v. *Mayes* (6th Cir. 1975) 512 F.2d 637, 651 [witnesses' refusal to testify procured by defendant acting through counsel who purported to represent both defendant and witness])

Colluding or conspiring with a witness by, inter alia, marrying the witness to avoid having the witness testify (see *Commonwealth* v. *Szerlong* (Mass. 2010) 933 N.E.2d 633[16]; see also *United States* v. *Montague* (10th Cir. 2005) 421 F.3d 1099, 1102–1103)

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[15] In *Steele*, the defense used a combination of tactics to prevent the witness from testifying. One of the defendants (Owen) obtained a lawyer for the witness, and Owen's own lawyer remained as the witness's co-counsel. The defense objected to the witness being deposed in advance of trial based on the marital privilege. "The court ordered the deposition go forward, during which the witness stated her previous statement to the FBI was false. The defense then sought to prevent her testimony at trial by claiming the deposition established marital privilege, she could assert her Fifth Amendment right, and her prior statement was false. The trial court overruled the objections and ordered the witness to testify. At trial, the witness's lawyer [who was no longer defendant Owen's own attorney but a new lawyer who was paid for by defendant Owen] stated the witness would not testify and he had counseled her not to do so." (*People* v. *Reneaux*, *supra*, 264 Cal.Rptr.3d at pp. 473-474 describing *Steele* at pp. 1197-1199.) On habeas review, the Sixth Circuit court held "it could not say the state court committed constitutional error by inferring from the facts that the defendants acting in concert wrongfully induced the witness not to testify, even though there was no evidence of specific threats." (*Reneaux* at p. 474 citing to *Steele* at p. 1203.) The Sixth Circuit noted "[t]he defendants had jointly agreed that [defendant] Owen would use his influence and control over the witness to induce her not to testify" and "[t]here was also evidence that the witness was afraid of [defendant] Owen, he obtained her lawyer, and that lawyer advised her not to testify." (*Ibid*.)

[16] In *Szerlong*, the court "held that a defendant's agreement to marry the victim to enable her to claim the spousal privilege and not have to testify against the defendant was wrongdoing that forfeited the right to challenge admitting the victim's out-of-court statements." (*People* v. *Reneaux, supra*, 264 Cal.Rptr.3d at p. 474 describing *Szerlong* at pp. 864-866.) "The marriage occurred after a

Fleeing the jurisdiction (see *United States* v. *Ponzo* (1st Cir. 2017) 853 F.3d 558, 579[17]; but see *People* v. *Melchor* (Ill. App. Ct. 2007) 875 N.E.2d 1261, 1272 and *State* v. *Alvarez-Lopez* (N.M. 2004) [98 P.3d 699, 704])[18]

Directing a witness to remain silent when asked to testify (see *State* v. *Hallum* (Iowa 2000) 606 N.W.2d 351, 353-357)[19];

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warrant had been issued for the defendant's arrest but before the defendant surrendered to authorities, and the victim informed others she had married the defendant so she would not have to testify in his case. (*Reneaux* at p. 474 describing *Szerlong* at pp. 859, 863-864.)

[17] The First Circuit in *Ponzo* did not go into an expansive analysis in finding that when a defendant flees the state to avoid jury trial, he does so at least partially motivated by the intent to cause the unavailability of witnesses who would otherwise have been available had he stayed and that the flight was the cause of the unavailability if the witnesses are later unavailable. The *Ponzo* analysis relied on case law discussing whether a defendant could complain about the lack of ability to cross-examine a witness but not the doctrine of forfeiture by wrongdoing in particular. (*Id*. at p. 579.) The validity of the holding likely turns not only on the assumption that there may be dual *motivations* for engaging in the wrongdoing that results in the witness' unavailability but on the assumption that there may be dual *causes* for the witness' unavailability.

[18] In *Melchor*, the court held that that doctrine of forfeiture by wrongdoing did not apply where the "[d]efendant's act of skipping bail and failing to appear at trial, although wrongful, was not aimed at intentionally procuring [the witness'] absence at a future trial [as] Defendant had no way of knowing that [the witness] would die at a young age of a drug overdose in the intervening years while defendant was a fugitive. (*Id*. at p. 456.) In *Alvarez-Lopez*, the court assumed absconding *migh*t constitute the requisite wrongdoing; but held there was insufficient evidence defendant intended to cause the witness's unavailability, even though the witness was initially available but was deported while defendant was a fugitive. (*Id*. at p. 704.)

[19] In *Hallum* (cited with approval in *People* v. *Reneaux*, *supra*, 264 Cal.Rptr.3d at p. 475) the defendant's half-brother gave a statement incriminating the defendant in a murder. Although the half-brother was granted immunity as to the events surrounding [the murder], he persisted in his refusal to testify in the defendant's case. The district court held [the half-brother] in contempt and confined him in the county jail pending his cooperation." (*Hallum*, *supra*, at p. 353.) At an evidentiary hearing, the prosecution introduced a letter from the defendant to his half-brother the defendant told him "to 'hang in there,' as there

1. Dissuasion of Victims of Domestic Violence as Wrongdoing

"Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions." (*Giles*, *supra*, 554 U.S. at p. 377; *People* v. *Quintanilla* (2020) 45 Cal.App.5th 1039, 1051.) Thus, declining to limit the definition of wrongdoing to physical violence, express threats or specific direction is "particularly apt in the context of domestic violence offenses and abusive relationships, which typically include an element of inherent psychological coercion, and the reality that "[t]his particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that [the witness] does not testify at trial." (*Davis* v. *Washington* (2006) 547 U.S. 813, 832-833; see also *People* v. *Reneaux* (2020) 264 Cal.Rptr.3d 459, 471.)

For example, in *People* v. *Reneaux* (2020) 264 Cal.Rptr.3d 459 [petition for review filed], after a defendant was arrested for acts of domestic violence, the defendant called the victim from jail. (*Id*. at p. 466.) "He told her she needed to call law enforcement and tell them she had made a false report. She agreed to

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were only two months left until defendant's trial. He did not think the trial court would admit the brother's recorded testimony. He told him to calm down and not discuss anything of importance on the phones." (*Reneaux*, at p. 475 citing to *Hallum* at pp. 356-357.) The prosecution also introduced a letter *from* the step-brother, who had been incarcerated for fourteen months for his refusal to testify in his brother's trial, implying that he was going to break down and testify if the defendant chooses to go to trial. (*Id*. at p 357.) At the evidentiary hearing, the step-brother continued to refuse to testify and stated that he would not testify even if requested by the defendant, but admitted that he was apologizing to his brother in the letter for the possibility that he would testify. (*Ibid*.) The appellate court upheld the trial court's finding the doctrine of forfeiture by wrongdoing applied because it was "naive to think that the defendant was not encouraging his brother to persist in his refusal to testify" in the first letter and because the letter from the step-brother to the defendant showed he "was influenced by the defendant and was concerned about how the defendant would feel . . . if [the step brother] broke down and testified." (*Id*. at p. 358 [and noting the trial court properly disbelieved the step-brother's claim he would not testify even if defendant asked him to testify].)

make the call. He continued, that she needed to tell law enforcement it was all a lie. She agreed to tell them that. He told her it was 'the only way,' the only thing she could do, because he wanted to marry her, and if he went to prison he would not have her anymore." (*Id.* at p. 470.) She repeatedly promised she would get him out. (*Ibid.*)

About two weeks later, the victim requested a copy of the police report, left a voicemail with the investigating officer that she wanted to change the report, and said that what the officer had written down was not exactly what had happened. She also called the district attorney's office to say she had lied. (*Ibid.*)

The defendant spoke with the victim again after she was subpoenaed to appear for a trial readiness conference. During that conversation, defendant made statements intimating that the victim not appear at the hearing in response to the subpoena. The victim did not show up for the readiness conference. (*Ibid.*)

At a foundational hearing, the victim took the witness stand and refused to answer any questions, notwithstanding the People's offer of a grant of immunity. (*Id.* at p. 467, 470.) The victim's attorney stated that the victim had given him instructions that even if the witness were given "all encompassing" immunity, she would not testify. (*Id.* at p. 467.) The prosecution nonetheless called the victim at trial. She answered a few general questions about where she lived, but stated she was not answering any more questions." (*Ibid.*) The trial court allowed her statements to come into evidence pursuant to the forfeiture by wrongdoing doctrine. (*Ibid.*) The appellate court upheld admission of the statements, noting that it "was reasonable to infer from this evidence, that defendant's statements telling her not to cooperate with law enforcement and promising to marry her but only if she got him out of jail were intended to, and did, cause [the victim] to recant her statements to law enforcement, and later, to refuse to testify despite a grant of immunity. (*Id.* at p. 470.)

The *Reneaux* appellate court rejected the defense argument that there was no inference of a threat, intimidation, or coercion for the victim to not come to court because all the defendant did was ask the victim to recant her previous lie. (*Id*. at p. 475.)[20] The appellate court recognized that defendant's statements were not "explicitly threatening or directive." (*Id*. at p. 471.) However, the court held that defendant's "exhortations to stop lying and to reveal false reports previously given, and to expressions of love and desire" as well as his intimations the victim not appear during the second phone call were the type of cajoling and urging that qualified as wrongdoing – especially given the context of domestic violence offenses and abusive relationships. (*Ibid*.)

In *People* v. *Merchant* (2019) 40 Cal.App.5th 1179, a defendant who was charged with kidnapping his girlfriend: (i) made obsessive, repeated calls (167 over a five-month period) to the victim; (ii) "begged the girlfriend to lay low, stay at home, and not invite company, venture out, or write correspondence"; (iii) told her charges would be dismissed if she evaded detection, whereas his life would be over if she came forward; (iv) asked his friends to "'keep [the witness] away for six months'" and made her aware that he had friends on the outside watching her; (vii) told her "You better. What the fuck you mean, you're trying to? You better" when she equivocated about trying to stick by him; (vii) expressed love and gratitude each time the victim promised not to appear; and (viii) engaged in this conduct in violation of a criminal protective (no-contact) order. (*Id*. at pp. 1186-1188.) The court held this conduct constituted sufficient wrongdoing, even

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[20] Arguably, even convincing a witness to testify but perjure herself by recanting an earlier accusation qualifies as wrongdoing intended to make the witness "unavailable" under the theory that the state has been deprived of valuable testimony by the defendant. (See *Commonwealth* v. *Edwards* (Mass. 2005) 830 N.E.2d 158, 171 ["Where a defendant's goal in colluding with a witness is to deprive the Commonwealth of valuable testimony, the defendant may be no less successful where the desired result is achieved by means other than those originally contemplated (such as a witness's refusal to testify)."].)

though it occurred nearly a year and a half before trial, since the victim told an investigator two weeks before trial she was still terrified of coming forward; and "[v]iewed in context of an abusive relationship, [the defendant's] pleading, cajoling, and careful monitoring of [the victim's] whereabouts could reasonably be taken as a threat to induce her nonappearance at trial a year later." (*Id.* at p. 1188.)

In *People* v. *Jones* (2012) 207 Cal.App.4th 1392, the defendant was on trial for choking someone who told his ex-girlfriend that he was seeing another woman. The ex-girlfriend told detectives that she had ended her five-year relationship with the defendant because of physical violence, and that on the date of the charged offense, he had called her with the victim's cell phone to say, "'I just choked your homegirl out and I have her phone.'" (*Id.* at pp. 1395–1396.)

Based on defendant calling the ex-girlfriend a dozen times, and implying that "he has friends on the outside who can assist him in doing whatever is necessary," the court upheld admission of the ex-girlfriend's statements under the forfeiture by wrongdoing doctrine. (*Id.* at pp. 1396, 1398.)

2. Defendant's Involvement in Wrongdoing May Be Proved Through Circumstantial Evidence

Courts admit hearsay under the doctrine of forfeiture by wrongdoing without direct proof of a defendant's wrongful conduct. The evidence establishing that defendant directly or indirectly engaged in the wrongdoing can be circumstantial and based on reasonable inferences that defendant was involved. (See *United States* v. *Jonassen* (7th Cir. 2014) 759 F.3d 653, 662 ["evidentiary foundation for admitting hearsay under Rule 804(b)(6) will almost always be circumstantial"]; *United States* v. *Scott* (7th Cir. 2002) 284 F.3d 758, 764 ["It would not serve the goal of Rule 804(b)(6) to hold that circumstantial evidence cannot support a finding of coercion."]; *People* v. *Geraci* (1995) 85 N.Y.2d 359, 369 [649 N.E.2d 817, 823] ["given the inherently surreptitious nature of witness tampering, the proponent of Grand Jury testimony or other hearsay evidence will

often have nothing more to rely upon than circumstantial proof"]; see also *Brittain* v. *State* (Ga. Ct. App. 2014) 766 S.E.2d 106, 114; *State* v. *Rinker* (N.J. Super. Ct. App. Div. 2016) 446 N.J.Super. 347, 364; *People* v. *Jones* (Mich. Ct. App. 2006) 714 N.W.2d 362, 371].)

For example, in *United States* v. *Johnson* (9th Cir. 2014) 767 F.3d 815, the defendant was charged with the robbery of an armored truck and murder of one of its guards. A government informant overheard the defendant and other gang members planning the heist, but, shortly before trial, the government could no longer locate her. (*Id*. at p. 818.) The district court allowed in the witness' statements based on evidence that the witness had received death threats from members of the defendant's gang, the defendant's mother had contacted the witness's live-in boyfriend looking for her, the defendant had informed other gang members that the witness was set to testify against him, and the threats began the day the defendant's attorney visited him in prison and likely first disclosed the government's witness list. (*Id*. at 818–819.) The Ninth Circuit upheld admission of the statements under Rule 804(b)(6) because "the evidence tended to show that [the defendant] alone had the means, motive, and opportunity to threaten [the witness], and did not show anyone else did." (*Id*. at 823.)

The Ninth Circuit in *Johnson* distinguished a case called *Perkins* v. *Herbert* (2d Cir. 2010) 596 F.3d 161, which held there was insufficient evidence of wrongdoing where the prosecution could not explain how the defendant, while incarcerated, had intimidated the witness since the "prison logs showed no contact with either the witness or a man defendant identified as his accomplice, and who allegedly conveyed the threats and obviously had his own motive to silence the witness." (*Perkins*, *supra*, at p. 173.)

The Ninth Circuit noted that, unlike in *Perkins*, in *Johnson*, "the Government produced declarations from a prison guard and an ATF agent describing how inmates communicate with each other and relay those

communications to those on the outside" and that a "prison guard further declared that he had seen [the defendant] engage in such communications." (*Johnson*, *supra*, at p. 823.)

D. The Element of Acquiescing in Wrongdoing

The United States Supreme Court has said the federal rule of evidence, rule 804(b)(6) "codifies the forfeiture doctrine." (*Giles* v. *California* (2008) 554 U.S. 353, 367; *Davis* v. *Washington* (2006) 547 U.S. 813, 833; see also *People* v. *Banos* (2009) 178 Cal.App.4th 483, 500.)

Rule 804(b)(6) states: A statement offered against a party that wrongfully caused--***or acquiesced in*** wrongfully causing--the declarant's unavailability as a witness, and did so intending that result." (Emphasis added.)

"Acquiescence consists of 'the act or condition of acquiescing or giving tacit assent; agreement or consent by silence or without objection.' Webster's Unabridged Dictionary 18 (Random House, 2nd ed.2001)." (*United States* v. *Rivera* (4th Cir. 2005) 412 F.3d 562, 567.) "[T]he plain language of [Rule 804(b)(6)] supports . . . [a] holding that a defendant need only tacitly assent to wrongdoing in order to trigger the Rule's applicability." (*Ibid.*)[21] It is not necessary to show "active participation or engagement" by the defendant or "personal commission of the crime." (*Ibid;* see also *United States* v. *Thompson* (7th Cir.2002) 286 F.3d 950, 964 [in the context of Rule 804(b)(6), defining "acquiesce" as "to accept or comply tacitly or passively," and noting that "acquiescence itself is an act" that can result in application of the forfeiture-by-wrongdoing exception].)

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[21] The *actual* role played by the defendant in *Rivera* in deciding whether the witness should be murdered was more significant than mere acquiescence, but the *definition* of acquiescence provided did not require the defendant to have taken a significant role in the planning nor, for that matter, any affirmative action. (*Id.* at pp. 567, fn. 4, 570.)

In *United States* v. *Dinkins* (4th Cir.2012) 691 F.3d 358, the Fourth Circuit stated: "The term 'acquiesce,' within the meaning of Rule 804(b)(6), encompasses wrongdoing that, while not directly caused by a defendant co-conspirator, is nevertheless attributable to that defendant because he accepted or tacitly approved the wrongdoing." (*Id*. at p. 385.)

"A number of courts have ruled that a witness's statement may be admissible under Rule 804(b)(6) against a defendant conspirator who did not directly procure the unavailability of the witness, so long as a coconspirator had done so, the misconduct was within the scope and in furtherance of the conspiracy, and the misconduct was reasonably foreseeable to the conspirator." (*United States* v. *Cazares* (9th Cir. 2015) 788 F.3d 956, 974; see also *United States* v. *Cherry* (10th Cir. 2000) 217 F.3d 811, 820; *United States* v. *Thompson* (7th Cir. 2002) 286 F.3d 950, 964; *United States* v. *Rivera* (E.D.Va.2003) 292 F.Supp.2d 827, 833.)

However, at least one federal court of appeals has held that in order to satisfy the Confrontation Clause, the rule's use of the word "acquiescence" requires proof of "active, culpable conduct, as *Giles* requires," and not "simple acquiescence in another's decision not to appear or to cause someone else not to appear." (*Carlson* v. *Attorney General of California* (9th Cir. 2015) 791 F.3d 1003, 1011.) "Simple tolerance of, or failure to foil, a third party's previously expressed decision either to skip town himself rather than testifying or to prevent another witness from appearing does not 'cause' or 'effect' or 'bring about' or 'procure' a witness's absence." (*Id*. at p. 1010; see also *State* v. *Rinker* (N.J. 2016) 141 A.3d 412, 422, fn. 10 [comparing *Carlson* and *Dinkins*].)

E. The Element of Intent

"[T]he requirement of intent 'means that the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable.'" (*Giles* v. *California* (2008) 554 U.S. 353, 367.) The defendant

must "engag[e] in wrongdoing that renders the declarant unavailable with an intent to prevent that declarant's in-court testimony." (*People* v. *Perez* (2018) 4 Cal.5th 421, 455, fn. 3.)

However, since the ultimate goal of dissuading a witness from cooperating with the police is not just to avoid arrest but conviction, it stands to reason the doctrine applies "not only when the defendant intends to prevent a witness from testifying in court but also when the defendant's efforts were designed to dissuade the witness from cooperating with the police or other law enforcement authorities." (*People* v. *Banos* (2009) 178 Cal.App.4th 483, 501; see also *Giles*, *supra*, 554 U.S. at p. 377 ["evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine."]; *People* v. *Quintanilla* (2020) 45 Cal.App.5th 1039, 1051 [same].)

It is not required that there be a pending case to meet the intent element of the doctrine. (See *People* v. *Peterson* (Ill. 2017) 106 N.E.3d 944, 964 [collecting cases interpreting state rules akin section 804(b)(6) coming to this conclusion and federal cases concluding the rule applies to *potential* witnesses]; *United States* v. *Burgos-Montes* (1st Cir. 2015) 786 F.3d 92, 115 ["forfeiture-by-wrongdoing exception is available for statements by a witness who was murdered before charges were brought if it was 'reasonably foreseeable that the investigation [would] culminate in the bringing of charges.']).

1. A Defendant May Have Multiple Reasons for Engaging in the Wrongdoing. However, as Long as One of the Reasons is to Make the Witness Unavailable, the Intent Element is Satisfied.

It is fairly well-established that the wrongdoing perpetrated by the defendant need not be the sole intent of the defendant in carrying out the wrongdoing. (See *People* v. *Banos* (2009) 178 Cal.App.4th 483, 504; *United*

States v. *Cazares* (9th Cir.2015) 788 F.3d 956, 975; *United States* v. *Jackson* (4th Cir. 2013) 706 F.3d 264, 267; *United States* v. *Martinez* (D.C.Cir. 2007) 476 F.3d 961, 966; *United States* v. *Houlihan* (1st Cir.1996) 92 F.3d 1271, 1279.) "[S]o long as a defendant intends to prevent a witness from testifying, the forfeiture-by-wrongdoing exception applies even if the defendant also had other motivations for harming the witness." (*United States* v. *Jackson* (4th Cir. 2013) 706 F.3d 264, 265 [interpreting exception to Confrontation Clause]; see also this bench memo at p. 33 [describing intent requirement under section 1390].)

2. Intent as Shown Through Acts of Domestic Violence

"Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify." (*Giles v. California*, *supra*, 554 U.S. at p. 355; see also *People* v. *Quintanilla* (2020) 45 Cal.App.5th 1039, 1058.)

For example, in the case of *People* v. *Kerley* (2018) 23 Cal.App.5th 513, the decomposed body of the defendant's girlfriend was found in a remote area. (*Id.* at pp. 523-524.) The trial court admitted extensive testimony about domestic violence between the defendant and his girlfriend, including statements that the girlfriend made to police officers on two occasions when they responded to domestic violence calls and out of court statements about the domestic violence that the girlfriend made to others. (*Id.* at pp. 521-522, 544-546, 560-562.) In

finding the these statements were properly admitted pursuant to section 1390 and the forfeiture by wrongdoing doctrine, the court noted that the defendant had threatened to kill his girlfriend if she called the police; isolated the victim "from family and friends to keep her from seeking outside help; discouraged her from calling the police, reporting her abuse to authorities, or cooperating in a prosecution; and knew she was a likely witness in his pending felony prosecution for beating her up" on a prior occasion. (*Id.* at p. 556 [and noting, as well, that by keeping the victim from seeing her family and friends, he clearly communicated to the victim that, if she called the police, he would kill her].)

Even without a pending case, the history of domestic violence can be used to support an inference the person was killed to prevent them from testifying. In *People* v. *Banos* (2009) 178 Cal.App.4th 483, the defendant was convicted of murdering his ex-girlfriend. The trial court allowed in statements by the ex-girlfriend to police officers about the defendant's domestic abuse under the forfeiture by wrongdoing doctrine. The admission of those statements was upheld on appeal based on the following: (i) prior to the killing, the defendant was arrested three times based on the victim's complaints to police; (ii) the victim had previously cooperated with police, making it reasonable to infer that he would be prosecuted for breaking into her house and that she would testify about it unless she was killed; and (iii) there was earlier taped telephone calls in which the defendant told the victim: "'Do you want to speak to the police?' 'Are you going to talk?' 'Are you going to speak with the cops? Are you going to speak?'" (*Id.* at pp. 485-486, 502.)

However, just because there have been past acts of domestic violence does not *necessarily* mean that the act resulting in the victim's unavailability was done with the required intent.

In *People* v. *Quintanilla* (2020) 45 Cal.App.5th 1039, for example, the defendant was charged with murder of his girlfriend. At a foundational hearing seeking to admit statements of the deceased victim, the People put on several

witnesses who attested to what the victim told them about acts of abuse committed against the victim. Many observed injuries that corroborated the claims of abuse. (*Id*. at p. 1052.) An expert on domestic violence also testified at the foundational hearing and stated that "in general, abusers often dissuade victims from reporting the abuse to law enforcement by exerting control and dominance in the relationship and by creating fear of harm in the victim, and that abusers also isolate victims to prevent the detection of abuse." (*Id*. at p. 1053.) The expert opined that the victim's relationship with defendant contributed to her reluctance to call law enforcement concerning the abuse. However, when asked whether he could say with certainty that the victim was killed so that she wouldn't report the incidents to the police, the expert stated that he could not say "conclusively" the victim was killed so she wouldn't make a report that day." (*Id*. at p. 1053.) After acknowledging the witnesses never specifically said anything "about the defendant doing something to her specifically so that she wouldn't tell law enforcement," the trial judge concluded it was a reasonable inference that the victim lived in an "environment" that "by its very nature is threatening and harming her to the point where she's afraid to report anything." (*Id*. at p. 1054.)

The appellate court held that there was *insufficient* evidence to show defendant's motive in killing the victim was, in part, to make the witness unavailable. The court believed it amounted to no more than mere speculation to make this claim based on evidence of how defendant acted during earlier domestic violence incidents where (i) there was no pending proceeding against defendant at the time of the killing for which the victim could have been a witness; (ii) the victim had not threatened to go to the authorities to initiate one; (iii) the victim was *reluctant* to report the defendant to authorities because she loved him and because she was afraid of what he might do to her when he got out of jail; and (iv) while there was evidence defendant controlled and intimidated the victim and did not want anyone to see the injuries he inflicted on her, there

was no evidence he ever made any prior threats that he would kill Charlene if she went to the authorities or became a witness against him. (*Id*. at p. 1055.)

The *Quintanilla* court rejected the claim the expert testimony could provide a basis for the inference defendant killed the victim to prevent her from being a witness, considering that even the expert could not opine "conclusively" the defendant acted with that motive. (*Id*. at p. 1056.) The *Quintanilla* court went so far as to say that absent specific evidence of abuse or threats of abuse "intended to dissuade the victim from resorting to outside help" or "evidence of ongoing criminal proceedings at which the victim would have been expected to testify," the violence and elements of control, isolation and fear common to many cases of domestic violence, "without more, is insufficient to satisfy the intent requirement of Evidence Code section 1390." (*Id*. at p. 1058.)

F. The Element of Causation

The wrongful conduct must not only be intended to cause the unavailability of the witness, it must actually cause the witness to be unavailable. (See *Giles* v. *California*, *supra*, 554 U.S. at pp. 358-360; *People* v. *Banos*, *supra*, 178 Cal.App.4th at p. 502.) "Simple tolerance of, or failure to foil, a third party's previously expressed decision either to skip town himself rather than testifying or to prevent another witness from appearing does not 'cause' or 'effect' or 'bring about' or 'procure' a witness's absence." (*People* v. *Reneaux* (2020) 264 Cal.Rptr.3d 459, 472; *Carlson* v. *Attorney General of California* (9th Cir. 2015) 791 F.3d 1003, 1009-1010; accord *Anderson* v. *State* (Nev 2019) 447 P.3d 1072, 1077.) "'[I]ndirect and attenuated' consequences will not satisfy the causation condition for purposes of forfeiture." (*State* v. *Maestas* (N.M. 2018) 412 P.3d 79, 90.)

However, "causation need not be established by direct evidence or testimony." (*People* v. *Krisik* (Ill. App. Ct. 2018) 108 N.E.3d 273, 283; accord *State* v. *Maestas* (N.M. 2018) 412 P.3d 79, 90; see also *Anderson* v. *State* (Nev.

2019) 447 P.3d 1072, 1078 [A "causal relationship between the defendant's actions and the witness's absence need not be proven by direct evidence. Rather, circumstantial evidence may be proffered to demonstrate that the witness's absence is 'at the very least, … a logical outgrowth or foreseeable result of the [defendant's efforts].'"].)

Although several cases have discussed the issue of whether the intent to render the witness unavailable must be the sole intent of the defendant in carrying out the wrongdoing (see this bench memo, *infra*, at pp. 19-20), few cases have weighed in the issue of whether the wrongdoing must be the sole reason for the witness' unavailability. (But see *Carr* v. *State* (Ind. Ct. App. 2018) 106 N.E.3d 546, 553 [finding defendant's bribery and numerous phone calls caused witness' unavailability while recognizing the witness had softened toward defendant (who had kidnapped and stabbed her), had agreed to have sexual relations with the defendant, and had stopped cooperating with the prosecution].)

However, if the general law regarding causation is applied, it should not make a difference that the defendant's wrongdoing was not the sole reason causing the witness' unavailability so long as it was a *substantial factor* in causing the unavailability.

A defendant may "be criminally liable for a result directly caused by his act, even though there is another contributing cause." (*People* v. *Jennings* (2010) 50 Cal.4th 616, 643; *People* v. *Schmies* (1996) 44 Cal.App.4th 38, 48–49; *People* v. *Pike* (1988) 197 Cal.App.3d 732, 749; see also *People* v. *Sanchez* (2001) 26 Cal.4th 834, 846 ["it has long been recognized that there may be multiple proximate causes of a homicide, even where there is only one known actual or direct cause of death"]; *People* v. *Holmberg* (2011) 195 Cal.App.4th 1310, 1322 ["there can be more than one cause of injury and that multiple causes *can combine to cause harm*"], emphasis added.)

"California courts have adopted the 'substantial factor' test in analyzing proximate cause. (*People* v. *Holmberg* (2011) 195 Cal.App.4th 1310, 1321 citing

to *Mitchell* v. *Gonzales* (1991) 54 Cal.3d 1041, 1050–1053.) "'The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical.' [citation] Thus, 'a force which plays only an "infinitesimal" or "theoretical" part in bringing about injury, damage or loss is not a substantial factor' [citation], but a very minor force that does cause harm is a substantial factor [citation]." (*People* v. *Holmberg* (2011) 195 Cal.App.4th 1310, 1321 citing to *Bockrath* v. *Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 79; see also *People* v. *Canizalez* (2011)197 Cal.App.4th 832, 845 ["The People's burden of proving causation is met if evidence is produced from which it may be reasonably inferred that the defendant's act was a substantial factor in producing the result of the crime."]; *People* v. *Jennings* (2010) 50 Cal.4th 616, 643 ["When the conduct of two or more persons contributes concurrently as the proximate cause of the death, the conduct of each is a proximate cause of the death if that conduct was also a substantial factor contributing to the result."].)

"In general, an 'independent' intervening cause will absolve a defendant of criminal liability." (*People* v. *Cervantes* (2001) 26 Cal.4th 860, 871.) "However, in order to be 'independent' the intervening cause must be 'unforeseeable … an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause.'" (*Ibid.*) "On the other hand, a 'dependent' intervening cause will not relieve the defendant of criminal liability." (*Ibid.*) "If an intervening cause is a normal and reasonably foreseeable result of defendant's original act the intervening act is 'dependent' and not a superseding cause, and will not relieve defendant of liability. [Citation.] '[ ] The consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. [ ] The precise consequence need not have been foreseen; it is enough that the defendant should have foreseen the possibility of some harm of the kind which might result from his act.'" (*Ibid.*)

Applying these principals to the question of whether a defendant's wrongdoing "was intended to, and did, procure the unavailability of the declarant as a witness," it can be seen that the fact the victim may have had multiple reasons for refusing to testify does not mean the defendant cannot be held responsible for procuring the victim's unavailability. General principles of causation dictate that the defendant should still be held "liable" for the declarant's refusal to testify regardless of whether the declarant was also motivated by reasons independent of defendant's wrongdoing – so long as the defendant's wrongdoing was a substantial reason for the declarant's unavailability. (Cf., *Commonwealth* v. *Rosado* (Mass. 2018) 106 N.E.3d 651, 657 ["where a defendant actively assists a witness's efforts to avoid testifying, with the intent to keep that witness from testifying, forfeiture by wrongdoing may be established 'regardless of whether the witness already decided "on [her] own" not to testify.'"]; *Cody* v. *Commonwealth* (Va. Ct. App. 2018) 812 S.E.2d 466, 481–482 [same]; *Anderson* v. *State* (Nev. 2019) 447 P.3d 1072, 1077 [similar]; *State* v. *Maestas* (N.M. 2018) 412 P.3d 79, 90 [suggesting tort law's familiar "but-for" principle may not be enough to establish causation and "other courts have explained something more like a 'precipitating and substantial' cause may be required"]; cf., *People* v. *Holmberg, supra,* 195 Cal.App.4th at p. 1322 ["there can be more than one cause of injury and . . . multiple causes can combine to cause harm"].)

G. The Element of Unavailability

A witness is deemed unavailable for purposes of the forfeiture by wrongdoing doctrine when the witness does not show up to testify, invokes a privilege not to testify, or refuses to testify regardless of the existence of a privilege. (See *People* v. *Reneaux* (2020) 264 Cal.Rptr.3d 459, 467, 470; *Cody* v. *Commonwealth* (Va. Ct. App. 2018) 812 S.E.2d 466, 480-482; *State* v. *Hallum* (Iowa 2000) 606 N.W.2d 351, 357-358; *Hendrix* v. *State* (Ga. 2018) 813 S.E.2d

333, 341-342; *Commonwealth* v. *Szerlong* (Mass. 2010) 933 N.E.2d 633, 641-642; *Steele* v. *Taylor* (6th Cir. 1982) 684 F.2d 1193, 1197-1199; see also Evid. Code, § 240(a)(1)-(6).)

In general, if the prosecution is seeking to introduce the statement of an unavailable witness over a Confrontation Clause objection, it must show "a good-faith effort" was made to obtain the presence of the witness at trial. (*People* v. *Herrera* (2010) 49 Cal.4th 613, 622.) "[U]navailability in the constitutional sense . . . requires a determination that the prosecution satisfied its obligation of good faith in attempting to obtain [the witness's] presence." (*Id*. at pp. 622-623.)

In determining whether a witness is "unavailable" for Confrontation Clause purposes, "if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. 'The lengths to which the prosecution must go to produce a witness ... is a question of reasonableness.'" (*People* v. *Herrera* (2010) 49 Cal.4th 613, 622.)

This requirement is not necessarily eliminated just because it can be shown that the defendant engaged in wrongdoing that caused the witness to avoid coming to court or being served with a subpoena. The prosecution must still show reasonable diligence in seeking to bring the witness to court to establish unavailability for both Confrontation Clause and Evidence Code section 240(a)(5) purposes. (See *People* v. *Roldan* (2012) 205 Cal.App.4th 969, 979 citing to *People* v. *Herrera*, *supra*, 49 Cal.4th at p. 622.)

That said, evidence of the fact defendant engaged in wrongdoing in an attempt to render the witness unavailable will be highly relevant to determining the *likelihood* of locating the witness, the *level* of effort required, and the *adequacy* of government efforts. (Cf., *State* v. *Iseli* (Oregon 2020) 458 P.3d 653, 665, 668 [wrongdoing of defendant is relevant to question of whether witness unavailable for purposes of Oregon evidentiary statutes relating to forfeiture by wrongdoing hearsay exception and defining unavailability]; this memo at p. 36.)

II.
THE FORFEITURE BY WRONGDOING HEARSAY EXCEPTION: EVIDENCE CODE SECTION 1390

A. The Elements of the Hearsay Exception of Section 1390

Evidence Code section 1390 provides:

"(a) Evidence of a statement is not made inadmissible by the hearsay rule if the statement is offered against a party that has engaged, or aided and abetted, in the wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

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

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

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

(4) In deciding whether or not to admit the statement, the judge may take into account whether it is trustworthy and reliable."

(c) This section shall apply to any civil, criminal, or juvenile case or proceeding initiated or pending as of January 1, 2011."

B. The Distinction (and Overlap) Between Evidence Code Section 1391 and the Doctrine of Forfeiture by Wrongdoing that Overcomes a Confrontation Clause Objection

The United States Supreme Court has said that the *federal* rule of evidence, rule 804(b)(6), "codifies the forfeiture doctrine." (*Giles* v. *California* (2008) 554 U.S. 353, 367; *Davis* v. *Washington* (2006) 547 U.S. 813, 833; see also *People* v. *Banos* (2009) 178 Cal.App.4th 483, 500.) Although there is significant overlap between Rule 804(b)(6) and section 1390, there are some differences in language and content between the two statutes.

First, Rule 804(b)(6) states: A statement offered against a party that wrongfully caused--*or acquiesced in wrongfully causing*--the declarant's unavailability as a witness, and did so intending that result." (*Ibid*, emphasis added.) In contrast, section 1390 does not include the italicized language allowing for application of the exception when the party "acquiesces" in the wrongdoing.

Second, subdivision (b)(2) of section 1390 states "a finding that the elements of subdivision (a) have been met shall not be based solely on the unconfronted hearsay statement of the unavailable declarant, and shall be supported by independent corroborative evidence." (*Ibid*.) Rule 804(b)(6) has no comparable requirement. (See Fed. Rules Evid., rule 104, 28 U.S.C.A [rules of evidence do not apply at foundational hearings]; *People* v. *Stechly* (Ill. 2007) 870 N.E.2d 333, 353 [noting that in *Davis* v. *Washington, supra*, 547 U.S. at p. 833, the High Court "observed with apparent approval a state court ruling permitting consideration of "'hearsay evidence, including the unavailable witness's out-of-court statements"' at such hearings."]; but see *People* v. *Osorio* (2008) 165 Cal.App.4th 603, 611 [suggesting "prosecution cannot rely solely on the unavailable witness' unconfronted testimony, but must present independent corroborative evidence supporting the forfeiture finding" under the forfeiture by wrongdoing exception to a *Confrontation Clause* objection].)

Third, subdivision (b)(4) allows a court to "take into account" whether the statement "is trustworthy and reliable" in deciding whether to admit the statement. (*Ibid*.) The federal rule has no comparable provision.[22]

Thus, it is not entirely correct to say section 1391 "codified" the forfeiture by wrongdoing doctrine as California courts sometimes do. (See e.g., *People* v. *Reneaux*, *supra*, 264 Cal.Rptr.3d at p. 469; *People* v. *Kerley*, *supra*, 23 Cal.App.5th at p. 550.) Rather, it is more accurate to say the legal standard for determining whether Evidence Code section 1390 applies is *similar or analogous to* the standard used when determining whether a declarant's out-of-court testimonial statements may be admitted under the forfeiture by wrongdoing doctrine over a Confrontation Clause objection. (*People* v. *Quintanilla* (2020) 45 Cal.App.5th 1039, 1050.)

Moreover, "[b]ecause of the similarity of the legal standards, case law developed under the forfeiture by wrongdoing doctrine is helpful in applying Evidence Code section 1390." (*People* v. *Quintanilla* (2020) 45 Cal.App.5th 1039, 1051; see also *People* v. *Reneaux*, *supra*, 264 Cal.Rptr.3d at p. 469 [treating section 1390 as codifying the forfeiture by wrongdoing doctrine]; *People* v. *Kerley* (2018) 23 Cal.App.5th 513, 550 [same]; *People* v. *Jones* (2012) 207 Cal.App.4th 1392, 1397-1399 [drawing no distinction].)

Thus, it should be assumed that the case law describing the elements of wrongdoing, intent, causation, and unavailability for purposes of the Confrontation Clause applies equally to those same elements for purposes of section 1390. However, the case law defining what it means to "acquiesce" for purposes of assessing whether the defendant engaged in wrongdoing is inapplicable to section 1390 since it does not permit application of the hearsay

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[22] And understandably so, given that the exception "extinguishes confrontation claims on essentially equitable grounds" and "does not purport to be an alternative means of determining reliability." (*Crawford* v. *Washington* (2004) 541 U.S. 36, 62; *Davis* v. *Washington* (2006) 547 U.S. 813, 833.)

exception based on defendant's mere acquiescence to someone else's wrongdoing.

In practice, it will be relatively rare for a statement admissible over a Confrontation Clause objection to be inadmissible pursuant to section 1390. However, if the statement is *only* inadmissible under the forfeiture by wrongdoing exception of section 1390, other hearsay exceptions may permit introduction of the statement. And this holds true even though statements ordinarily offered pursuant to those exceptions might otherwise be excludable as testimonial hearsay (see e.g., Evid. Code, § 1370 and 1380) - so long as the requirements for using the forfeiture by wrongdoing doctrine of the Confrontation Clause objection are met.

C. What Level and Kind of Proof is Required to Meet the Elements of Section 1390?

The party seeking to invoke the hearsay exception of section 1390(b)(1) must "establish, *by a preponderance of the evidence*, that the elements of subdivision (a) have been met at a foundational hearing." (Evid. Code, § 1390(b)(1), emphasis added; see also this bench memo, at p. 4.)

In meeting this burden, the party may introduce the statement of the declarant. "However, a finding that the elements of subdivision (a) have been met shall not be based solely on the unconfronted hearsay statement of the unavailable declarant, and shall be supported by independent corroborative evidence." (Evid. Code, § 1390(b)(2).) On the other hand, if the hearing is "conducted after a jury trial has begun, the judge presiding at the hearing may consider evidence already presented to the jury in deciding whether the elements of subdivision (a) have been met." (Evid. Code, § 1390(b)(3).)

In making this determination of whether to admit a statement offered pursuant to section 1390, the court can consider whether the statement "is trustworthy and reliable." (Evid. Code, § 1390(b)(3).)

D. A *Defendant* Can Introduce a Hearsay Statement of a Witness Whose Unavailability Was Intentionally Procured by the *Government* Through Wrongdoing

Section 1390 permits the admission of statements "offered against a *party* that has engaged, or aided and abetted, in the wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." (Emphasis added.) The government is a party in a criminal proceeding. Thus, section 1390 should apply equally to circumstances in which the government engages in wrongdoing designed to make a witness unavailable. This is consistent with how rule 804(b)(6) is interpreted. (See Fed.R.Evid. 804, Notes of Advisory Committee on Rules—1997 Amendments ["The rule applies to all parties, including the government."]; *United States v. Leal–Del Carmen* (9th Cir. 2012) 697 F.3d 964, 974 [interpreting rule 804(b)(6), which applies to "parties" to allow admission of hearsay under the forfeiture by wrongdoing hearsay exception because the *Government* was responsible for rendering the declarant unavailable as a witness by a bad faith deportation of the witness];

However, whether actions on the part of law enforcement agents resulting in the unavailability of a witness (that are not sanctioned by the government) would qualify is an open question.

Note that a defendant does not have to worry about using the forfeiture by wrongdoing doctrine to overcome a *Confrontation Clause* objection to hearsay *offered by the defendant* (i.e., because the Sixth Amendment does not give the *government* rights) unless the hearsay is offered against a co-defendant. (See *People* v. *Sanchez* (2016) 63 Cal.4th 665, 680, fn. 6 ["Because *Crawford* is based on the Sixth Amendment right to confrontation, its rule has not been extended to civil proceedings or circumstances in which hearsay is offered by an accused in his own defense. Neither we nor the high court has had occasion to consider the rule when a defendant offers hearsay that may work to the detriment of a codefendant."].)

E. What Constitutes "Wrongdoing" for Purposes of Section 1390?

Cases interpreting what constitutes "wrongdoing" for purposes of the forfeiture by wrongdoing exception to the constitutional mandate of confrontation should define the scope of "wrongdoing" for purposes of section 1390. (See this bench memo, *supra*, at pp. 4-17.)

F. What is the Required Intent for Purposes of Section 1390?

Section 1391 identifies the necessary state of mind of the person who engaged in the wrongdoing as he intent to "procure the unavailability of the declarant as a witness." (Evid. Code, § 1390(a).) With the exception of cases interpreting what it means to "acquiesce" in wrongdoing, cases interpreting the required intent for purposes of the forfeiture by wrongdoing exception to the constitutional mandate of confrontation should define the necessary intent for purposes of applying section 1390. (See this bench memo, *supra*, at pp. 18-23.)

1. A Defendant May Have Multiple Reasons for Engaging in the Wrongdoing. However, as Long as One of the Reasons is to Make the Witness Unavailable, the Intent Element is Satisfied.

"Evidence Code section 1390 is satisfied by a finding that at least one of the defendant's reasons for committing the wrongdoing that made the declarant unavailable was to make the declarant unavailable as a witness, although the defendant may also have had other reasons for the wrongdoing." (*People* v. *Quintanilla* (2020) 45 Cal.App.5th 1039, 1049 citing to *People* v. *Kerley* (2018) 23 Cal.App.5th 513, 558; see also, this bench memo, at pp. 19-20.)

G. What Constitutes Sufficient Causation for Purposes of Section 1390?

Cases interpreting what constitutes "causation" for purposes of the forfeiture by wrongdoing exception to the constitutional mandate of

confrontation should define what it means to "procure" the unavailability of the witness for purposes of section 1390. (See this bench memo, *supra*, at pp. 23-26.)

H. The Element of Unavailability

For purposes of the Evidence Code, including section 1390, the definition of unavailability is located in Evidence Code section 240. The definition covers circumstances, inter alia, in which the witness cannot be found, the witness asserts a privilege, or the witness refuses to testify despite being held in contempt. Specifically, section 240 provides:

"(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) Persistent in refusing to testify concerning the subject matter of the declarant's statement despite having been found in contempt for refusal to testify.

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

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

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

Note that when prosecution is seeking to introduce the statement of the witness under section 1390, *in addition to* showing the unavailability is attributable to the defendant's wrongdoing, the prosecution will often have to show "reasonable diligence" in locating the witness. This is because such diligence is necessary to establish that the witness' attendance cannot be compelled or procured as is required to show unavailability pursuant to Evidence Code section 240(a)(4) or (5). (Cf., *State* v. *Iseli* (Oregon 2020) 458 P.3d 653, 663, 667 [interpreting definition of "unavailability" for purposes of applying analogous forfeiture by wrongdoing hearsay exception to section 1390 as requiring such a showing].)

However, in assessing whether a party has exercised "reasonable diligence" evidence that defendant engaged in wrongdoing in an attempt to render the witness unavailable will be highly relevant evidence to determining, the

likelihood of locating the witness, the *level* of effort required, and the *adequacy* of government efforts.

Evidence that a witness has been encouraged or coerced to avoid service should relieve the prosecution of having to engage in the type of efforts ordinarily required to locate the witness who is not subject to the same compulsion. And thus, a court should *consider* whether there has been wrongdoing engaged in by the defendant in assessing whether there has been a sufficient showing of unavailability for purposes of sections 1390 and 240(a)(5). (Cf., *State* v. *Iseli* (Oregon 2020) 458 P.3d 653, 665, 668 [wrongdoing of defendant relevant to question of whether witness unavailable for purposes of Oregon evidentiary statutes relating to forfeiture by wrongdoing hearsay exception and defining unavailability].)[23]

Dated: _____

Respectfully submitted,
XXXX X. XXXXXXXX
DISTRICT ATTORNEY

By: _____
Xxxxx Xxxxxx
Deputy District Attorney

[23] A similar showing of unavailability is required to overcome a Confrontation Clause objection. (See *People* v. *Herrera*, *supra*, 49 Cal.4th at p. 622; this bench memo, at p. 27.)