SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	AB 593	**Hearing Date:**	June 9, 2015
Author:	Levine		
Version:	February 24, 2015		
Urgency:	No	**Fiscal:**	No
Consultant:	MK		

Subject: ***Hearsay: Admissibility of Statements***

HISTORY

Source: California District Attorneys Association

Prior Legislation: AB 1723 (Lieu) Chapter 537, Stats. 2010
AB 268 (Calderon) 2007 (Amended to be different subject matter while in Senate Judiciary Committee)
AB 2093 (Karnette) 2006 (Failed Assembly Public Safety)
AB 141 (Cohn), Chapter 116, Stats. 2004
SB 1876 (Solis) - Ch. 261, Stats. 1996

Support: The California Chamber of Commerce; California College and University Police Chiefs; California State Sheriffs' Association; Crime Victims United of California

Opposition: None known

Assembly Floor Vote: 79 - 0

PURPOSE

This bill repeals the January 1, 2016 sunset date of the "forfeiture by wrongdoing" hearsay exception.

Existing law defines "unavailable as a witness," for purposes of the Evidence Code, to include a declarant who is:

- Exempted or precluded on grounds of privilege from testifying concerning the matter to which his or her statement is relevant;
- Disqualified from testifying to the matter;
- Dead or unable to attend or testify because of physical or mental illness or infirmity;
- Physically absent and the court is unable to compel attendance;
- Physically absent even though the proponent has exercised reasonable diligence but has been unable to procure his or her attendance by the court process;
- Persistent in refusing to testify concerning the subject matter of the delcarant's statement despite having been found in contempt for refusal to testify (Evidence Code Section 240 (a).)

Existing law specifies that a declarant is not unavailable as a witness if the declarant's unavailability was procured by the wrongdoing of the proponent of the declarant's out-of-court statement for the purpose of preventing the declarant from attending or testifying. (Evidence Code § 240 (b).)

Existing law defines "hearsay evidence" as a statement made by a declarant, other than a witness while testifying, that is offered to prove the truth of the matter stated. Specifies that except as provided by law, hearsay evidence is inadmissible. (Evidence Code § 1200.)

Existing law provides that, in a criminal action, a statement that is otherwise admissible as hearsay evidence under the Evidence Code is inadmissible if its admission would violate the constitutions of either California or the United States. (Evidence Code § 1204.)

Existing law enumerates several "hearsay exceptions" that permit the admission of hearsay statements where the circumstances surrounding the statement create presumptions in favor of its truthfulness, including dying declarations, "excited utterances," statements against interest, statements of mental or physical states and, under specified circumstances, certain prior recorded statements, former testimony, business and official records, and other recorded statements or published writings, as specified. (Evidence Code §§1220 through 1341.)

Existing law provides that, in a criminal proceeding charging a serious felony, a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable and 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 and the unavailability is the result of the death by homicide or the kidnapping of the declarant. Requires further that the declarant's out-of-court statement was memorialized by a tape recording made by law enforcement or a written statement prepared by a law enforcement official and signed by declarant and notarized prior to the death or kidnapping of the declarant. Specifies the procedure by which the above elements must be proved. (Evidence Code § 1350.)

Existing law provides that, in a criminal prosecution, where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect, as specified, is not made inadmissible by the hearsay rule if the court finds certain indicia of reliability and the child either testifies at the proceedings or is unavailable as a witness. Requires the proponent of the statement to provide adverse party with advance notice in order to provide adverse party with a fair opportunity to prepare to meet the statement. (Evidence Code §1360).

Existing law provides that a statement that purports to narrate or describe the infliction or threat of physical injury is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement was made at the time of infliction or threat; was made in writing and recorded by a physician, nurse, paramedic, or law enforcement official; and was made under circumstances that would indicate its trustworthiness. (Evidence Code § 1370.)

Existing law provides that, in a criminal prosecution for elder and dependent adult abuse, a statement made by the victim is not made inadmissible by the hearsay rule if the victim is unavailable as a witness, the statement was made under circumstances which indicate its trustworthiness, and the victim, at the time of the proceeding or hearing, suffers from the infirmities of advanced age or other form of organic brain damage, or other physical, mental, or emotional dysfunction. (Evidence Code § 1380.)

Existing law provides that evidence of a statement is not made inadmissible by the hearsay rule if the statement is offered against a party that has engaged in, or aided and abetted, in the wrongdoing intended to, and did procure the unavailability of the declarant as a witness. (Evidence Code § 1390(a))

Existing law provides that hearsay evidence, including the hearsay evidence that is subject of the foundational hearing, is admissible at the foundational hearing. However, a finding that the elements have been met shall not be based solely on the uncomforted hearsay statement of the unavailable declarant and shall be supported by independent corroborative evidence. (Evidence Code § 1390(b)(2))

Existing law provides that 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 are met. (Evidence Code § 1390(b)(3))

Existing law provides that this hearsay exception it creates sunsets on January 1, 2016. (Evidence Code § 1390(d)).

This bill removes the sunset on this provision.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity."(Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v.*

Brown (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for The Bill

According to the author:

> AB 593 continues to allow an exception to the hearsay rule in cases where a witness is unavailable to testify, for reasons such an intimidation or death.
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> In 2010, the Legislature unanimously approved and the Governor signed AB 1723 (Lieu, 2010), which established a "forfeiture by wrongdoing" hearsay exception.. This exception allowed for the introduction of hearsay as evidence if the witness was unavailable due to some wrongdoing on the part of the defendant.
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> At the time this exception was created, a sunset date was included (January 1, 2016), to allow the Legislature to consider whether the negative consequences predicted by the opponents would actually come to pass. That sunset date is fast approaching, and we are unaware of widespread problems that the forfeiture by wrongdoing exception has created in the last four years.

2. The Hearsay Rule

Under the hearsay rule, an out-of-court statement cannot be admitted if it is offered to prove the truth of the matter asserted. This general rule is subject to several hearsay exceptions that have developed over the years, first at common law and then codified into federal and state rules of evidence. The hearsay rule reflects the law's preference for live testimony, which is given under oath, subject to cross-examination, and seen by the jury. The several exceptions to the hearsay rule generally come into play when the witness is not available to testify, but the circumstances of their out-of-court statements somehow suggest the reliability or probable truthfulness of those statements. Some classic examples include the "dying declaration" and "excited utterances," since presumably people do not have the inclination or the time, respectively, to think up a lie under such circumstances. In theory, the circumstances under which the statement was made creates a measure of reliability that serves as an imperfect but necessary substitute for the things that supposedly make in-court statements more reliable, such as an oath and the opportunity to cross-examine.

3. Forfeiture by Wrongdoing Exception

In 2010 the Legislature created a new hearsay exception providing that evidence of a statement that is offered against a party who has engaged, or aided and abetted, in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness is not made inadmissible by the hearsay rule. At the time supporters of the bill argued that it this exception was necessary prevents the "injustice" that occurs when a party is responsible for a person not being able to testify in court and that it is consistent with a federal hearsay exception and exceptions in other states. However, because of concerns raised by the opposition, a sunset was placed in the bill. The author argues that there is no evidence of abuse of this exception and thus the sunset should be removed. The sponsor, the California District Attorneys Association states:

> EC 1390 has proven to be a valuable tool for prosecutors in instances where witnesses or victims have been intimidated or killed in order to prevent them from testifying.
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> To illustrate the types of cases in which the forfeiture by wrongdoing exception is used, suppose a witness testifies before a grand jury that she ahs seen a gang member commit a drive-by shooting. Without EC 1390, if the gang member then kills, or acquiesces in the killing of, the witness, the witness' testimony is not admissible in the trial on the drive-by shooting.
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> Similarly, suppose a woman makes a report to the police that her husband has assaulted her and the husband is then charged with spousal abuse. Without EC 1390, if the husband then successfully intimidates the woman so that she is no longer willing to testify, her out-of-court statements would be inadmissible at trial.
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> AB 593 is necessary to remove the sunset date on the forfeiture by wrongdoing hearsay exception. This helps prevent the injustice that occurs when a criminal defendant is able to exclude hearsay statements of an unavailable victim or witness, even though the defendant is the very person who is responsible for the victim or witness being unavailable to testify in court.

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