The Sample Brief

We close out the forfeiture series with a sample brief template. This is a California based template and I have added a list of California cases that discuss forfeiture. A list of forfeiture cases from all 50 states and federal court will soon be available. Anyone who is subscribed will be able to access the full list when it becomes available.

The brief

Caveat: When using this or any brief you obtain from another source, it is your obligation to check for currentness and accuracy.

I hate giving out sample briefs because your brief should be specifically tailored to your case. This sample only serves as one possible way to address forfeiture with your court.

FACTS

[Begin with an incident summary]

In this case, the victim is unavailable for the purposes of Evidence Code 240 [STATE REASONS WHY HERE].

The victim's unavailability is a direct result of the Defendant's criminal act committed with the specific intent to prevent the victim from testifying.

[STATE evidence here—jail tapes, NNC order, statements of earlier abuse etc. etc.]

The statements the People wish to introduce fall under evidence [list here]

[LIST SPECIFIC STATEMENTS and the exception(s)that apply

These statements are not unduly prejudicial, and the probative value outweighs any prejudicial effect.

WHILE THE SIXTH AMENDMENT GUARANTESS A DEFENDANT THE RIGHT TO SEE, HEAR, AND CONFRONT THE WITNESSES AGAINST THEM, THE RIGHT IS NOT ABSOLUTE.

The Sixth Amendment's Confrontation Clause is not absolute. In Reynolds v. United States, (1879), 98 US 145, 25 L.Ed 244, a Defendant informed a Deputy Marshall who was there to subpoena his second wife for a bigamy trial that she would not be coming and when asked where she was, Defendant replied "[T]hat will be for you to find out." 98 U.S. 145, 160-61 (1879). At trial Defendant objected to the admission of her previous testimony on Sixth Amendment grounds. The Supreme Court found that defendant had forfeiture his right to cross examine the witness noting, "If he voluntarily keeps the witness, away he cannot insist on his privilege of being confronted with the witness against him." Id. At 158.

In Crawford v. Washington, (2005) 541 U.S. 36, 124 S.Ct. 1354, the U.S. Supreme Court held that testimonial evidence may not be admitted against a defendant without an adequate prior opportunity to cross examine the witness against him. The Court however, noted that the rule of forfeiture by wrongdoing can extinguish confrontation claims on essentially equitable grounds. "For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability. (Citing Reynolds v. United States). Id. At 62.

In Davis v. Washington (2006) 547 US 813, 126 S.Ct. 2266, the Court again referenced the equitable doctrine of forfeiture by wrongdoing. The court focused on the nature of domestic violence. "This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free. Cf. Kyllo v. United States, (2001) 533 US 27, (suppressing evidence from an illegal search). But when 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. Davis at 833.

In Giles v. California, (2008) 554 US 353, 128 S.Ct. 2678, the United Supreme Court looked at whether the murder of a domestic violence victim constituted forfeiture by wrongdoing. Giles held that two forms of testimonial statements were admitted at common law even though they were unconfronted. One was dying declarations. "A second common-law doctrine, which we will refer to as forfeiture by wrongdoing, permitted the introduction of statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant." 128 S.Ct. at 2683. Early terms used to define the scope of the rule "suggest that the exception applied only when the defendant engaged in conduct designed to prevent the witness from testifying." Id. (emphasis in original). The manner in which the rule had been applied made it plain that

unconfronted testimony would not be admitted “without a showing that the defendant intended to prevent a witness from testifying.” 128 S.Ct. at 2684.

The Court held that an intentional criminal act causing the witness’s absence in and of itself is insufficient for a forfeiture finding; absent the specific intent to procure her absence. Id. at 2693. The court noted, “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. testimony to police officer or cooperation in criminal prosecutions. Id. 377.

WHILE COURTS HAVE LONG RECOGNIZED THE EQUITABLE GROUNDS OF FORFEITURE BY WRONGOING CALIFORNIA HAS CODIFIED THE DOCTRINE OF FORFEITURE BY WRONGDOING.

California has codified forfeiture by wrongdoing in California Evidence Code Section 1390:

(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.

California courts have also accepted the concept of forfeiture by wrongdoing.

In People v. Banos, (2009) 178 Cal.App.4th 483, 502, 100 Cal.Rptr.3d 476, 491, the court held there was evidence that defendant killed the victim to prevent her from reporting domestic abuse in addition to preventing her from testifying at trial. That allowed the trial court to admit her previous statements to officers regarding defendant's threats.

In People v. Kerley (2018) 23 Cal.App.5th 513, the court looked at forfeiture by wrongdoing in the context of a homicide case. The court relied upon Giles and Banos in determining that a part of the defendant's intent in the killing was to prevent the victim from reporting to police. But see, People v. Quintanilla (2020) 45 Cal. App. 5th 1039.

In People v. Merchant, (2019) 40 Cal.App.5th 1179, the court found the defendant had engaged in forfeiture by wrongdoing. After his arrest, the defendant made numerous jail calls with his friends, Buck and Snake, to keep the victim away from being subpoenaed. Even though Buck told the defendant the victim would not be appearing, the defendant demanded to hear it from the victim. She confirmed she would not be coming to court. The court found the defendant's efforts forfeited his right to confront the victim at trial. The victim in this case was never supportive of prosecution.

In People v. Reneaux, (2020) 50 Cal.App.5th 852, the defendant persuaded his victim to go to the law enforcement agency and the prosecutor and claim she had lied. He told her that was the only way he would be able to get out. This contact occurred after the offense and after a protective order had been issued preventing the defendant from contacting the victim. The court again found such conduct amounted to forfeiture by wrongdoing. Merchant and Reneaux involved defendants making contact with their victims after the issuance of a protective order.

Below are some sample points and authorities for various issues that arise with victims who refuse to testify or who testify inconsistent with prior statements.

A DOMESTIC VIOLENCE VICTIM MUST RESPOND TO A SUBPOENA.

CCP 1219(b) prevents a victim of domestic violence or sexual assault from being incarcerated for a refusal to testify. CCP 1219 states:

a) Except as provided in subdivisions (b) and (c), if the contempt consists of the omission to perform an act which is yet in the power of the person to perform, he or she may be imprisoned until he or she has performed it, and in that case the act shall be specified in the warrant of commitment.

(b) Notwithstanding any other law, a court shall not imprison or otherwise confine or place in custody the victim of a sexual assault or domestic violence crime for contempt if the contempt consists of refusing to testify concerning that sexual assault or domestic violence crime. Before finding a victim of a domestic violence crime in contempt as described in this section, the court may refer the victim for consultation with a domestic violence counselor. All communications between the victim and the domestic violence counselor that occur as a result of that referral shall remain confidential under Section 1037.2 of the Evidence Code.

(c) Notwithstanding any other law, a court shall not imprison, hold in physical confinement, or otherwise confine or place in custody a minor for contempt if the contempt consists of the minor's failure to comply with a court order pursuant to subdivision (b) of Section 601 of, or Section 727 of, the Welfare and Institutions Code, if the minor was adjudged a ward of the court on the ground that he or she is a person described in subdivision (b) of Section 601 of the Welfare and Institutions Code. Upon a finding of contempt of court, the court may issue any other lawful order, as necessary, to secure the minor's attendance at school.

(d) As used in this section, the following terms have the following meanings:

(1) “Sexual assault” means any act made punishable by Section 261, 262, 264.1, 285, 286, 287, 288, or 289 or former Section 288a of the Penal Code.

(2) “Domestic violence” means “domestic violence” as defined in Section 6211 of the Family Code.

(3) “Domestic violence counselor” means “domestic violence counselor” as defined in subdivision (a) of Section 1037.1 of the Evidence Code.

(4) “Physical confinement” has the same meaning as defined in subdivision (d) of Section 726 of the Welfare and Institutions Code.

As such, CCP 1219 prohibits incarceration only for the refusal to testify.

This does not eliminate the need to appear on a subpoena. The failure to appear on a subpoena constitutes a violation of Penal Code Section 1331. A witness may be incarcerated for failing to comply with a subpoena even if that witness may be able to refuse to testify without the consequence of incarceration as a sanction for contempt. Although section 1219(b) prevents the incarceration of sexual assault and domestic violence victim/witnesses for refusal to testify, those witnesses still must comply with the subpoena process under Penal Code section 1331. People v. Cogswell, (2010) 48 Cal.4th 467.

MARSY'S LAW DOES NOT PROVIDE THE VICTIM A RIGHT TO REFUSE TO TESTIFY IN DOMESTIC VIOLENCE CASE.

The series of victim rights referred to as Marsy's Law were a part of changes to the California Constitution Article 1, Section 28. These changes were added by Initiative Measure Proposition 9, approved by the voters November 4, 2008. These changes increased a victim's right to be present, to be notified of the proceedings, and to be heard. The limitations on the court's ability to incarcerate a domestic violence victim for refusal to testify were added by statute in 2008 as part of Senate Bill 1356. The initiative changes took place November 5, 2008 while the statutory changes to CCP 1219 did not occur until January 1, 2009. Marsy's Law and CCP 1219 are two entirely different things. Marsy's Law creates victim rights, CCP 1219 limits court authority to punish contempt. They are not related.

IF THE VICTIM REFUSES TO TESTIFY, THE COURT SHOULD REFER THE VICTIM TO A DOMESTIC VIOLENCE COUNSELOR PRIOR TO HOLDING THE VICTIM IN CONTEMPT.

Code of Civil Procedure Section 1219 provides that:

> (a) Except as provided in subdivision (b), when the contempt consists of the omission to perform an act which is yet in the power of the person to perform, he or she may be imprisoned until he or she has performed it, and in that case the act shall be specified in the warrant of commitment.
>
> (b) Notwithstanding any other law, no court may imprison or otherwise confine or place in custody the victim of a sexual assault or domestic violence crime for contempt when the contempt consists of refusing to testify concerning that sexual assault or domestic

violence crime. Before finding a victim of a domestic violence crime in contempt as described in this section, the court may refer the victim for consultation with a domestic violence counselor. All communications between the victim and the domestic violence counselor that occur as a result of that referral shall remain confidential under Section 1037.2 of the Evidence Code.

(c) As used in this section, the following terms have the following meanings:

(1) "Sexual assault" means any act made punishable by Section 261, 262, 264.1, 285, 286, 288, 288a, or 289 of the Penal Code

(2) "Domestic violence" means "domestic violence" as defined in Section 6211 of the Family Code.

(3) "Domestic violence counselor" means "domestic violence counselor" as defined in subdivision (a) of Section 1037.1 of the Evidence Code

IF THE VICTIM CONTINUES TO REFUSE TO TESTIFY, THE REFUSAL SHOULD BE PRESENTED IN FRONT OF THE JURY.

Since the refusal to testify is not a right, it should be treated differently than the invocation of a right, such as the privilege against self-incrimination. Evidence Code Section 913 states:

(a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

(b) The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

Since the refusal to answer questions is not a privilege, it is not entitled to the same protections as the assertion of a privilege. A case that illustrates this point is People v. Lopez (1991) 71 Cal.App.4th 1550. In Lopez, the prosecution called a gang member in order to establish the gang allegation. The witness had been convicted of the gang offense and the time for his appeal had expired. The witness told the court he would refuse to testify and Lopez wanted the witness to be found in contempt outside the jury's presence. The Appellate court upheld the trial court's decision to present the evidence in front of a jury:

No person other than a defendant has a right to refuse to be sworn as a witness (Vannier v. Superior Court(1982) 32 Cal.3d 163, 171, 185 Cal.Rptr. 427, 650 P.2d 302; People v. Chandler (1971) 17 Cal.App.3d 798, 805, 95 Cal.Rptr. 146). And after administration of the oath, a witness who has a privilege to assert must generally assert it on a question-by-question basis. (People v. Ford (1988) 45 Cal.3d 431, 441, 247 Cal.Rptr. 121, 754 P.2d 168; People v. Shipe (1975) 49 Cal.App.3d 343, 349, 122 Cal.Rptr. 701; cf. People v. Cornejo (1979) 92 Cal.App.3d 637, 658–659, 155 Cal.Rptr. 238.) Initial inquiries intended to test the validity of the claim should be conducted outside the presence of **658the jury. (People v. Mincey, supra,2 Cal.4th at p. 441, 6 Cal.Rptr.2d 822, 827 P.2d 388; People v. Ford, supra, 45 Cal.3d at p. 441, fn. 6, 247 Cal.Rptr. 121, 754 P.2d 168.) If the court finds a valid privilege exists, it can either limit the questions the parties may ask before the jury or excuse the witness, if it becomes clear that any testimony would implicate the privilege. See also, People v. Morgain (2009) 177 Cal.App. 4th 454.

The cases:

People v. Quintanilla (2020) 45 Cal.App.5th 1039

People v. Reneaux (2020) 50 Cal. App.5th 852

People v Merchant (2019) 40 Cal.App.5th 1179

People v. Kerley (2018) 23 Cal.App.5th 513

People v. Clark (2016) 63 Cal.4th 522

People v. Streeter (2012) 54 Cal.4th 205

People v. Mai (2013) 57 Cal.4th 986

People v. Jones (2012) 207 Cal.App.4th 1392

People v. Traugott (2010) 184 Cal.App.4th 49

People v. Banos (2009) 178 Cal.App.4th 483

People v. Byron (2009) 170 Cal.App.4th 657

People v. Concepcion (2008) 45 Cal.4th 77

People v. Osorio (2008) 165 Cal.App.4th 603

People v. Pearson (2008) 165 Cal.App.4th 740

People v. Parish (2007) 152 Cal.App.4th 263

People v. Quitiquit (2007) 155 Cal.App.4th 1

People v Ledesma (2006) 39 Cal.4th 641

People v. Pantoja (2004) 122 Cal.App.4th 1