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Karleen F. Murphy

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NOTE

A HEARSAY EXCEPTION FOR
PHYSICAL ABUSE

I. INTRODUCTION

On October 3, 1995 the jury for People v. Simpson found the defendant, Orenthal James Simpson (hereinafter "OJ Simpson") not guilty of the murders of Nicole Brown Simpson and Ronald Goldman based on the evidence admitted.¹

In response to this verdict, the California legislature enacted a new hearsay exception, §1370 of the California Evidence Code.² This section allows the limited use of hearsay


Nicole Brown Simpson and Ronald Goldman were murdered in June of 1994. Nicole Brown Simpson wrote in her diary and told friends and family that OJ Simpson had beaten her repeatedly during their marriage, that she lived in fear of him and that he threatened to kill her. These statements were ruled inadmissible hearsay. Rich Harris, State Law To Permit Use Of Nicole Simpson's Diary In Civil Trial, L.A. DAILY NEWS, September 5, 1996, at N10; Pamela Martineau, Goldman Tells Lawmakers To Adopt Bill To Broaden Exceptions For Hearsay Evidence, METROPOLITAN NEWS, March 28, 1996, at 10.

2. CAL. EVID. CODE § 1370 (West 1997) states:
   (a) Evidence of a statement by the declarant is not made inadmissible by the hearsay rule if all of the following conditions are met:
      (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
      (2) The declarant is unavailable as a witness pursuant to § 240.
      (3) The statement was made at or near the time of the

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evidence in certain domestic abuse cases. Section 1370 defines a new hearsay exception for a declarant's hearsay statements narrating, describing or explaining the infliction or threat of physical injury upon the declarant by the party against whom the statement is offered. This hearsay exception applies when the declarant is unavailable to testify as a

infliction or threat of physical injury. Evidence of statements more than five years before the filing of the current action or proceeding shall be inadmissible under this section.

(4) The statement was made under circumstances that would indicate its trustworthiness.
(5) The statement was made in writing, was electronically recorded, or made to a law enforcement official.
(b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following:
(1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.
(2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.
(3) Whether the statement is corroborated by evidence other than the statements that are admissible only pursuant to this section.
(c) A statement is admissible pursuant to this section only if the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.

Id.

4. CAL. EVID. CODE § 1370 (West 1997).
5. CAL. EVID. CODE § 240 (West 1996). According to § 240, unavailable as a witness means 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.
witness at the trial.\textsuperscript{6}

Governor Wilson signed the new exception for hearsay testimony of physical abuse into law on September 4, 1996.\textsuperscript{7} The California legislature made the evidentiary statute effective immediately in order to permit the admission of relevant evidence of physical abuse in various criminal and civil proceedings.\textsuperscript{8} The legislature did not intend for this new hearsay exception to affect other evidentiary requirements,\textsuperscript{9} impair a

(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 which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify 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.\textsuperscript{10}

\textit{Id.}

6. \textit{Id.}


8. 1996 Cal. Legis. Serv. Ch. 416 (A.B. 2068) (West Sept. 4, 1996). The bill providing for this new hearsay exception states:

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are: In order to permit the admission of important evidence in various civil and criminal proceedings as soon as possible, it is necessary that this act take effect immediately.

\textit{Id.}


9. 1996 Cal. Legis. Serv. Ch. 416 (A.B. 2068) (West Sept. 4, 1996); Section one of the bill for this new hearsay exception refers specifically to §§ 351 and 352 of the California Evidence Code. The comment to § 351 states:

The Evidence Code contains a number of provisions that exclude relevant evidence either for reasons of public policy or because the evidence is too unreliable to be presented to the trier of fact. See, e.g., Evidence Code §
party’s right to attack the credibility of the declarant pursuant to § 1202,\textsuperscript{10} or affect the defendant’s right to discovery for the purposes of producing rebuttal evidence attacking the declarant’s credibility.\textsuperscript{11} The legislature did intend that § 1370 be used in a manner consistent with a defendant’s due process and confrontation rights under the Federal and California Constitutions.\textsuperscript{12}

Prior to this new exception, California law excluded relevant and trustworthy hearsay evidence of a defendant’s threats and infliction of physical abuse directed toward the declarant when the declarant’s statements did not conform to any of the existing hearsay exceptions.\textsuperscript{13} The most publicized example of this function of California law was the exclusion of hearsay statements made by Nicole Brown Simpson in her diary and to her friends and family, describing threats and physical abuse by her ex-husband, OJ Simpson.\textsuperscript{14} Apparently, Nicole Brown

\begin{itemize}
\item Section 352, discretion of court to exclude evidence, states “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” CAL. EVID. CODE § 352 (West 1996).
\item 10. CAL. EVID. CODE § 1202 (West 1996). Section 1202, credibility of hearsay declarant states:
\begin{quote}
Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such a declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had the opportunity to explain or deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing. For the purposes of this section, the deponent of a deposition taken in the action in which it is offered shall be deemed to be a hearsay declarant.
\end{quote}
\item 12. Id.
\item 14. Id.
\end{itemize}
Simpson made these statements in order to reveal her potential murderer. In the Simpson criminal trial, the prosecution offered the hearsay statements made by Nicole Brown Simpson in her diary and to others relating the infliction of physical abuse by her ex-husband, under the state of mind hearsay exception, § 1250. However, the statements were inadmissible under that exception. The author of the bill proposing § 1370 stated that a jury should have evidence of a victim's statements of the infliction or threats of physical abuse by the defendant, if sufficiently corroborated. The new hearsay exception allows for the admission of such evidence, but only when the strict requirements of § 1370 are met.

This Comment will trace the history of the hearsay rule under both common law and California law. It examines the early use of the common law state of mind hearsay exception regarding statements of fear and physical abuse. It will also discuss the enactment of the California Evidence Code (hereinafter “Code”) and the later codification of the state of mind hearsay exception. In addition, it will examine People v. Ruiz, a case which applied the Code's state of mind hearsay exception to prohibit statements regarding the victims' fear of the defendant and the physical abuse which the defendant inflicted on the declarants. This Comment will examine the rationale behind the new hearsay exception, the particular requirements of § 1370, and its compliance with other provisions of the Code and the California Constitution. Finally, this Comment will examine the application of § 1370 to the admission of evidence in the civil trial against OJ Simpson.

17. Id.
18. CAL. COMM. ANALYSIS STATEMENT, ASSEMBLY FLOOR BILL NO. 2068, 8/20/96.
19. CAL. EVID. CODE § 1370 (West 1997).
20. See, infra notes 29-115 and accompanying text.
21. See, infra notes 29-90 and accompanying text.
22. See, infra notes 91-104 and accompanying text.
24. See, infra notes 105-115 and accompanying text.
25. See, infra notes 116-123 and accompanying text.
26. See, infra notes 124-151 and accompanying text.
27. See, infra notes 152-177 and accompanying text.
II. BACKGROUND

Hearsay evidence is evidence of a declarant’s out of court statement which is offered for the truth of the matter asserted in the statement. The chief reasons for excluding hearsay evidence are that such statements are not made under oath, the adverse party has no opportunity to cross-examine the declarant, and the jury is unable to observe the declarant’s demeanor while making the statement.

Both the United States Constitution and the California Constitution contain a Confrontation Clause that guarantees a criminal defendant the right “to be confronted with the witnesses against him.” Use of the Confrontation Clause is limited to criminal prosecutions and is available only to the accused. Thus, it is unavailable to the prosecution in a criminal proceeding or to either party in civil litigation.

Although the Confrontation Clause makes no provision for hearsay exceptions, one of its basic purposes is to promote the integrity of the fact finding process. The Supreme Court has consistently held that the Clause does not necessarily prohibit the admission of hearsay statements against a criminal defendant, even though the admission violates the literal terms of the Clause. This has led to a debate as to whether the Clause simply constitutionalizes the hearsay rule for the criminal defendant, or whether it places limitations on the introduction of evidence admissible under the hearsay rule and

28. CAL. EVID. CODE § 1200 (West 1996). Section 1200, the hearsay rule, defines hearsay as “evidence of a statement that was made other than by the witness while testifying at the hearing and that is offered for the truth of the matter stated.” Id.


30. U. S. CONST. amend. VI; CAL. CONST. art. 1, § 15. The constitutional provisions state “In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.” Id.


32. Id.

33. U.S. CONST. amend. VI; CAL. CONST. art. 1, § 15.


The most recent Supreme Court decisions seem to suggest that the Clause constitutionalizes the hearsay rule, at least as applied to firmly rooted hearsay exceptions.

In *Ohio v. Roberts*, the Court considered the impact of the Confrontation Clause on the admission of hearsay statements falling under the federal hearsay exception for former testimony. The Court held that when a statement falls under a hearsay exception which requires the unavailability of the declarant, the Confrontation Clause also requires the statement bear "adequate indicia of reliability." A hearsay statement is considered "reliable" when it falls within a long established or firmly rooted hearsay exception. In other cases, the statement must be excluded absent a showing of particularized guarantees of trustworthiness. Trustworthiness is determined from circumstances surrounding the statement and the trustworthiness of the declarant.

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37. *Id.*
38. *Ohio v. Roberts, 448 U.S. 56 (1980).*
39. *Id.; FED. R. Evid. 804(b)(1).* Section 804 states:
   The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
   (1) Former testimony. Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

*Id.*

40. *Roberts, 448 U.S. at 66-74 (1980).*
41. Illinois, 502 U.S. at 355-56 n.8 (1992). The White court, in determining whether certain hearsay exceptions were firmly rooted, considered three factors: the amount of time the hearsay exceptions had been in existence, whether the Federal Rules of Evidence recognized the hearsay exception, and whether the exception is widely recognized by the states. *Id.*
42. *Wright, 497 U.S. at 815-17 (1990).* The United States Supreme Court held that "admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded long-standing judicial and legislative experience in assessing the trustworthiness of certain types of out of court statements." *Id.*
43. *Roberts, 448 U.S. at 66 (1980).*
44. McCormick, * supra note 31, § 324, at 538-39.* Section 324 states factors in evaluating circumstances of trustworthiness, which include, but are not limited to, whether the declarant had a motivation to speak truthfully, the duration of time lapse between the event and the statement, whether the declarant had first hand
However, in United States v. Inadi, the Court refused to extend Robert's Confrontation Clause requirements to out-of-court co-conspirator statements. Similarly, in White v. Illinois, the Court refused to extend the Robert's unavailability rule to two hearsay exceptions: statements for the purposes of medical diagnosis and spontaneous declarations, holding

knowledge, whether the statement was spontaneous or in response to leading questions and whether the declarant later recanted or affirmed the statement. Id.

46. Fed. R. Evid. 801(d)(2)(E). Under this section, such statements are party admissions and are not considered hearsay. This section defines statements of co-conspirators as "a statement by a co-conspirator of a party made during the course and in furtherance of the conspiracy." Id.

However, under the California Rules of Evidence, statements of co-conspirators are hearsay and fall under a specific hearsay exception. Section 1223, admission of a co-conspirator, states:

Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;
(b) The statement was made prior to or during the time that the party was participating in the conspiracy; and
(c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

48. Fed. R. Evid. 803(4). Under this section, the statements are not excluded by the hearsay rule, even though the declarant is available as a witness. Section 803(4) defines statements for the purposes of medical diagnosis or treatment as statements "describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof as reasonably pertinent to diagnosis or treatment." Id.
49. Fed. R. Evid. 803(2). Under 803(2), excited utterances are not excluded by
that such statements satisfied the Confrontation Clause because they fell under firmly rooted hearsay exceptions.\textsuperscript{50}

In \textit{Idaho v. Wright},\textsuperscript{51} the Court imposed constitutional limitations on nontraditional hearsay exceptions.\textsuperscript{52} There, the Court held that statements falling under such hearsay exceptions are not firmly rooted\textsuperscript{53} and are presumptively unreliable and inadmissible for the purpose of the Confrontation Clause absent a showing of particularized guarantees of trustworthiness.\textsuperscript{54} Trustworthiness is indicated from the totality of the circumstances surrounding the making of the statement which render the declarant particularly trustworthy.\textsuperscript{55} Statements not falling under firmly rooted hearsay exceptions require that the declarant's truthfulness be so evident from the surrounding circumstances that cross-examination is of marginal utility.\textsuperscript{56}

In sum, hearsay statements falling under traditional or firmly rooted exceptions\textsuperscript{57} comply with the Confrontation Clause.\textsuperscript{58} When the particular exception does not require un-

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\item the hearsay rule, even though the declarant is available as a witness. Excited utterances are defined as "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." \textit{Id.}
\item \textit{Id.} at 815-18.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 820-21.
\item \textit{Id.} at 820-21. The Court gave examples of hearsay exceptions in which the circumstances surrounding the making of the statement indicate trustworthiness. The Court stated:
\begin{quote}
The basis for the excited utterance exception, for example, is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous. Likewise the 'dying declaration' and 'medical treatment' exceptions to the hearsay rule are based on the belief that persons making such statements are highly unlikely to lie.
\end{quote}
\item \textit{Id.} at 820-21. The Court held that statements falling under firmly rooted hearsay exceptions are trustworthy because court precedence recognizes that adversarial testing adds little to the statement's reliability. \textit{Id.}
\item McCormick, \textit{supra} note 31, § 252, at 442-43.
\end{itemize}
availability, it is unlikely that the Court will hold that the Confrontation Clause requires such a showing. However, where the exception requires unavailability, the Clause will also require such a finding. Further, newly created statutory hearsay exceptions arguably should be subject to the test set forth in Wright requiring that hearsay exceptions which are not firmly rooted are inadmissible absent a showing of particularized guarantees of trustworthiness.

A. COMMON LAW HEARSAY RULE

At early common law no rules against hearsay existed. However, common law judges realized that untrained jurors needed guidance in evaluating evidence, and therefore began to develop rules restricting the admissibility of evidence. In addition, restrictions on admitting evidence were necessary to prevent jurors from being misled by irrelevant, biased or fraudulent testimony. Restrictions were also needed to minimize the risk of jurors being persuaded by their own emotions, sympathies, and prejudices. As a result, numerous exclusionary rules of evidence gradually developed throughout the 17th and 18th century. These common law judges created a complex framework of rules in an attempt to ensure that only valuable and relevant evidence, free from the known risks of irrelevance, confusion and fraud, reached the jury. The American legal system aimed to use these rules based on extensive judicial experience with parties, witnesses, and jurors, to attain the truth through careful reasoning.

At the turn of the 19th century, the early common law courts of England recognized the state of mind hearsay exception, using it to disclose the state of mind of the declarant.

59. Id.
60. Id.
62. JOHN H. WIGMORE, A STUDENT'S TEXTBOOK OF THE LAW OF EVIDENCE, § 1, at 4-5 (The Foundation Press 5 1935) [hereinafter Wigmore].
63. Id.
64. Id.
65. Id.
66. Id.
67. Wigmore, supra note 62, § 1, at 4-5.
68. Id.
Similarly, early California courts adopted the common law state of mind hearsay exception and used it to prove the declarant's fear of the defendant and the defendant's infliction or threat of physical abuse upon the declarant. However, other California courts rejected this approach, reasoning that the risk of the jury improperly using the statements for the truth of the charges facing the defendant, outweighed their probative value.

1. People v. Merkouris

_people v. Merkouris_ illustrates how California courts admitted hearsay evidence relating the victims' fear of the defendant under the common law state of mind hearsay exception. In _Merkouris_, the California Supreme Court ruled that when the identification of the defendant as the victim's killer is in issue, evidence of the defendant's threatening conduct is relevant to show the reasonableness of the victim's fear or the victims' fearful state of mind. The _Merkouris_ Court ruled that hearsay statements of the two murder victims' declaring their fear of the defendant and intent to carry a gun, were admissible under the common law mental state exception to the hearsay rule. The trial court admitted the hearsay statements to prove the victims' fear and their intent to avoid, and protect themselves from the defendant who had threatened them.

_Aversen_ court, one of the first English common law courts to recognize the common law state of mind hearsay exception, admitted the declarant's hearsay statements relating the state of her own health at the time of the statement. Id.

70. People v. Merkouris, 344 P.2d 1, 7 (1959). The _Merkouris_ court admitted the victims' statements relating their fear of the defendant under the common law state of mind hearsay exception. The evidence was admissible to prove the victims' fear and that they had reason to fear the defendant. Id.


72. Id.

73. Id. at 6-7.

74. Id.

75. Id.

76. Merkouris, 344 P.2d at 6-7.
2. People v. Hamilton

In People v. Hamilton, the California Supreme Court implicitly contradicted the Merkouris rule by sharply limiting the admission of a victim’s declarations expressing fear of the defendant under the common law state of mind hearsay exception. The California Supreme Court ruled that testimony of the declarant’s state of mind relating to the victim’s fear of the defendant were admissible only when the declarant’s state of mind was itself the issue. The Court ruled that the victim’s state of mind was placed in issue after the defendant testified that he and the victim had an amicable relationship and that the victim invited him to her house on the night of the murder. Thus, the victim’s declarations were relevant to cast doubt on the defendant’s testimony. In addition, the Court ruled that when the declarant’s state of mind is at issue, the hearsay declarations must be made under trustworthy circumstances. In Hamilton, the California Supreme Court found that the victim’s statements were untrustworthy because they were made while the victim was trying to establish a defense for unlawfully carrying a gun.

Further, the California Supreme Court ruled that when the declarant’s fear of the defendant was at issue, the declarant’s statements could refer only to the defendant’s

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78. Id.
79. People v. Merkouris, 344 P.2d 1 (1959). The Merkouris court admitted the victims’ statements expressing fear of the defendant under the common law state of mind hearsay exception. Id.
80. Hamilton, 362 P.2d 473, 473-74 (1961). In Hamilton, the trial court admitted evidence of the victim’s diary entries relating incidents of physical, mental and sexual abuse, and death threats from her ex-husband, the defendant. The trial court also admitted the victim’s statements to police officers that she feared the defendant, that the defendant had beaten her and threatened to kill her. The trial court purportedly admitted all of the hearsay statements to show the murder victim’s state of mind, that she feared the defendant. Id.
81. Id. at 480.
82. Id. at 477.
83. Id.
84. Id. at 481. The Court held that declarations directly asserting the declarant’s mental state are admissible only when there is at least circumstantial evidence that the declarations are trustworthy and credible. Id.
85. Hamilton, 362 P.2d at 481.
threats of future conduct.\textsuperscript{86} Thus, the lower court erred in admitting the victim's diary entries and hearsay declarations stating the victim's belief or memory to prove the defendant's past acts and state of mind.\textsuperscript{87} In addition, the court held that the prejudicial effect on the defendant far outweighed the benefit of the statements for the prosecution.

B. THE DEVELOPMENT OF THE CALIFORNIA HEARSAY RULES

1. California Evidence Code

Prior to the enactment of the Code, California's statutes did not define hearsay or the hearsay rule.\textsuperscript{88} As a result, the hearsay rule and its exceptions were unclear, poorly organized and incomplete.\textsuperscript{89}

On January 1, 1967,\textsuperscript{90} the California legislature adopted

\textsuperscript{86} Id. at 480.
\textsuperscript{87} Id. at 482 (quoting Shepard v. United States, 290 U.S. 96 at 105-06 (1933)) (holding that declarations of intention, casting light on the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored). Id.
\textsuperscript{89} Id.
\textsuperscript{90} \textit{Cal. Evid. Code} § 12 (West 1996). Section 12 states:
(a) This code shall become operative on January 1, 1967, and shall govern proceeding in actions brought on or after that date and, except as provided for in subdivision (b), further proceedings in actions pending on that date.
(b) Subject to subdivision (c), a trial commenced before January 1, 1967, shall not be governed by this code. For the purposes of this subdivision:
(1) A trial is commenced when the first witness is sworn or the first exhibit is admitted into evidence and is terminated when the issue upon which the evidence is received is submitted to the trier of fact. A new trial, or a separate trial of a different issue, commenced on or after January 1, 1967, shall be governed by this code.
(2) If an appeal is taken from a ruling made at a trial commenced before January 1, 1967, the appellate court shall apply the law applicable at the time of the commencement of the trial.
(c) The provisions of Division 8 (commencing with Section 900) relating to privileges shall govern any claim or privilege made after December 31, 1966.

\textit{Id.}
the California Evidence Code. The Code codified the rule against admitting hearsay, as well as exceptions to this rule.\textsuperscript{91} While the Code states generally accepted hearsay exceptions, it allows the legislature and the courts to create additional hearsay exceptions through statutes and case law.\textsuperscript{92}

The Code's rule against hearsay makes inadmissible any out-of-court statement offered for the truth of the statement when made other than by the witness while testifying at the hearing,\textsuperscript{93} unless the statement fits one of the predefined exceptions or some other exception found in statutory or case law.\textsuperscript{94} Yet, even if evidence meets the requirements of a particular hearsay exception, it is not automatically admissible.\textsuperscript{95} The exceptions merely provide that such evidence is not inadmissible under the hearsay rule.\textsuperscript{96} If there is another rule of law which makes the evidence inadmissible, such as undue prejudice, the court has discretion to refuse to admit the evidence.\textsuperscript{97}

After the enactment of the Code, the courts often used the codified state of mind hearsay exception, § 1250,\textsuperscript{98} for admissibility.\textsuperscript{99}
ting a victim’s statements of fear of the defendant and state­ments relating the defendant’s infliction or threats of physical abuse.99 However, under Code § 1250, it is error to admit such statements unless the victim’s state of mind or conduct in conformity with that fear is in dispute.100 Further, the Code codified Hamilton’s trustworthiness requirements for admitting evidence under hearsay exception § 1250.101

2. People v. Ruiz102

People v. Ruiz103 exemplifies the manner in which the courts attempted to use § 1250 to allow a victim’s hearsay declarations expressing fear of the defendant and reiterates the Code’s statutory overruling of Merkouris.104 In Ruiz, the California Supreme Court recognized that § 1250 of the Code creates an exception to the hearsay rule for the declarant’s then existing state of mind.105 However, the Ruiz Court limited the application of §1250 to situations where the declarant’s state of mind is at issue or when the statements are offered to prove or explain the declarant’s subsequent acts or conduct.

(1) The evidence is offered to prove the declarant’s state of mind, emotion, or physical sensation at that time or any other time when it is itself an issue in the action; or
(2) The evidence is offered to prove or explain acts or conduct of the declarant.

(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.

Id.

99. People v. Pinn, 94 Cal. Rptr. 741, 744 (1971) (Hearsay statements in which the declarant told a witness that she feared the defendant and that he was “going to kill her,” were admissible under the state of mind hearsay exception).
101. Cal. Evid. Code § 1252 (West 1996). The comment to § 1252 states “Section 1252 limits the admissibility of hearsay statements that would otherwise be admissible under Sections 1250 and 1251. If a statement of mental or physical state was made with a motive to misrepresent or to manufacture evidence, the statement is not sufficiently reliable to warrant its reception in evidence. Id.
103. Id.
105. Id. at 862.
relating to that fear. In addition, § 1250 cannot be used to prove the accused's conduct or motive to kill, nor can the hearsay statements of the declarant's memory or belief be used to prove the facts remembered or believed. In Ruiz, the California Supreme Court held that § 1250 of the Code clearly overruled Merkouris, as Merkouris was not based on any probability of reliability.

In sum, § 1250 limits the use of a victim's statements of inflicted or threatened physical abuse, or the statements of a victim's fear of the defendant, to situations where the victim's state of mind is an issue in the action, or where the evidence explains the victim's conduct. Section 1250 prohibits using the statements to prove the defendant's past acts. Because § 1250 is a narrow exception, it is often not a proper evidentiary basis for admitting evidence of infliction or threat of physi-

106. Id.
107. Id. at 863-864.
109. Ruiz, 749 P.2d at 863. The California Supreme Court found no purpose for admitting the evidence other than to prove the defendant in fact killed the victim. Neither the victims' state of mind prior to their deaths nor their conduct in connection with that fear were at issue. The Ruiz court directly contradicted Merkouris, reasoning that the Merkouris use of the state of mind hearsay exception was not based on any probability of reliability, but on a rationale that destroys the very foundation of the hearsay rule. Id.

CAL. EVID. CODE § 1250 (West 1996). The comment to §1250 states: In Merkouris, the victims' hearsay statements relating the defendant's threats were in effect used to prove the truth of those threats, rather than for the purported purpose of showing the victims' state of mind as being fearful of the defendant. Section 1250(b) overrules Merkouris by making inadmissible evidence of a statement of memory or belief to prove the fact remembered or believed. Merkouris is repudiated in § 1250(b) because that doctrine undermines the hearsay rule itself. While other exceptions to the hearsay rule are based on some indicia of reliability peculiar to the evidence involved, the Merkouris exception is not based on any probability of reality. Distinguished from Merkouris are cases in which a murder victim's statements are used to prove or explain subsequent acts of the victim, and not as a basis for inferring that the defendant did the acts charged in the statement.

Id.

110. CAL. EVID. CODE § 1250 (West 1996).
111. Id.
III. DISCUSSION

A. THE RATIONALE BEHIND § 1370 HEARSAY EXCEPTION AND THE RELIABILITY OF STATEMENTS OF PHYSICAL ABUSE

Hearsay statements allowed by the exceptions generally reflect circumstances of trustworthiness. The California Supreme Court has determined that a statement's reliability is indicated not only by the words themselves, but from the surrounding circumstances, the declarant's possible motivation in making the statement and the declarant's relationship with the defendant.

Statements of threatened or inflicted physical abuse admissible under § 1370 are analogous to statements falling under hearsay exception § 1230 of the Code, declarations against interest. In general, declarations against interest are trustworthy because most people do not voluntarily make statements against their interests unless the statements are true. Similarly, a declarant's statements relating inflicted or threatened abuse could be considered generally trustwor-

115. CAL. EVID. CODE § 1230 (West 1996). Section 1230, declarations against interest states:

Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him the object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

Id.

116. Houghtaling, 21 Cal. Rptr.2d 855, 858-59 (1993) (holding that declarations against interest are based on the underlying theory that such statements carry deleterious personal consequences that a "reasonable man" would not have made unless he believed it to be true).
thy because simply recording, or reporting such incidents to a law enforcement official runs the risk that their abuser, or threatened abuser will discover the report and retaliate. Thus, the threat to the declarant’s physical well being ensures the truthfulness of the hearsay statement.

However, fear of retaliation does not always underlie the hearsay statement and a lack of such fear may render the statement untrustworthy. As a result, § 1370 contains requirements designed to eliminate those statements where the declarant is not motivated by a genuine fear of the abuser’s retaliation.

B. THE REQUIREMENTS OF § 1370

Prior to § 1370, the courts often used § 1250, the state of mind hearsay exception, to admit statements of physical abuse. However, § 1250 limited the use of such statements to show only the declarant’s state of mind or explain the conduct of the declarant. Conversely, § 1370 contains no such limitations, allowing the evidence to be used for all purposes. Hearsay evidence of inflicted or threatened physical abuse may be admissible if it complies with all six specified requirements of § 1370. These requirements are similar to those found in other exceptions under the Code and act to ensure the statement is relevant and trustworthy, as well as to

117. DEL MARTIN, BATTERED WIVES, 76 (Glide Publications 1976). The author explains that for battered women:

A call to the police is generally an act of desperation done in an emergency situation. However, once the police leave, the woman and her attacker are face to face again, both knowing that she called the police “on her own husband in his own home.” Thus, calling the police inadvertently worsened the situation.

118. Id.

119. People v. Hamilton, 362 P.2d 473, 481 (1961). The victim’s statements of fear were not trustworthy because they were made while the declarant was trying to establish a defense for unlawfully carrying a gun. Id.

120. CAL. EVID. CODE § 1370 (West 1997).

121. People v. Pinn, 94 Cal. Rptr. 741, 744 (1971).

122. CAL. EVID. CODE § 1250 (West 1997).

123. CAL. EVID. CODE § 1370 (West 1997).

124. Id.
protect and give the defendant a fair opportunity to meet the statement.\textsuperscript{125}

1. The Statement Relates To The Threat Or Infliction Of Physical Abuse

First, § 1370 requires the statement to narrate, describe, or explain the abuse or threat of physical injury upon the declarant.\textsuperscript{126} This requirement ensures a connection between the event and the content of the statement,\textsuperscript{127} thereby guaranteeing that only the relevant information, the statements of inflicted or threatened abuse, is relayed in the statement.\textsuperscript{128}

2. Unavailability Of The Declarant

Second, § 1370 requires the declarant be unavailable\textsuperscript{129} as a witness.\textsuperscript{130} This requirement reflects the court's preference for live witness testimony because the declarant is under oath, subject to cross examination and the jury can observe the witness's demeanor while making the statement.\textsuperscript{131} Although trial testimony is preferred, the "unavailability" of the witness necessitates resorting to the weaker substitute, the hearsay, in order to avoid a complete loss of the evidence.\textsuperscript{132} Meanwhile,

\begin{itemize}
\item \textsuperscript{125} See, infra notes 132-151 and accompanying text.
\item \textsuperscript{126} Cal. Evid. Code § 1370 (West 1997). Section 1370(a)(1) states "The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant." Id.
\item \textsuperscript{127} McCormick, supra note 31, § 272, at 477.
\item An identical provision is found in hearsay exception § 1240 of the Code. Section 1240, spontaneous statement, provides "Evidence of a statement is not made inadmissible by the hearsay rule if the statement (a) purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) was made spontaneously under the stress of the excitement caused by such perception." Cal. Evid. Code § 1240 (West 1996).
\item \textsuperscript{128} Cal. Evid. Code § 350 (West 1996). Section 350 states "No evidence is admissible except relevant evidence."
\item Cal. Evid. Code § 210 (West 1996). Section 210, states "relevant evidence," is evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in logic to prove or disprove any disputed fact that is of consequence to the determination of the action." Id.
\item \textsuperscript{129} Cal. Evid. Code § 240 (West 1997).
\item \textsuperscript{130} Cal. Evid. Code § 1370 (West 1997). Section (a)(2) states "The declarant is unavailable as a witness pursuant to § 240." Id.
\item \textsuperscript{131} People v. Green, 399 U.S. 149, 154 (1970).
\item \textsuperscript{132} People v. Hughey, 240 Cal. Rptr. 269 at 275 (1987).
\end{itemize}
it shows that statements of physical abuse are not valuable enough in their out-of-court context to render the availability of the declarant immaterial.\textsuperscript{133}

3. Proximity In Time Between The Event And The Statement

Third, § 1370 requires the statement be made at or near the time of the infliction or threat of physical injury and prohibits statements made more than five years before the filing of the current action.\textsuperscript{134} Recording the statement at the time or soon after, guarantees the reliability of the statements because the event is fresh in the declarant's memory when recorded.\textsuperscript{135} However, § 1370 prohibits statements made more than five years before the filing of the current action to ensure that the statement is not so remote as to render the statement untrustworthy and irrelevant.\textsuperscript{136}

\textsuperscript{133} The reasoning underlying this requirement is demonstrated by the hearsay exceptions under the Federal Rules of Evidence, where certain exceptions require the unavailability of the declarant, while others consider availability immaterial. Similar to § 1370, § 804 (1)-(5) of the Federal Rules require the unavailability of the declarant. Those exceptions include (1) former testimony, (2) statement under a belief of impending death, (3) statement against interest, (4) statement of personal or family history (5) other exceptions. \textit{Fed. R. Evid.} 804(1)-(5).

However, 803(1)-(24) considers the availability of the declarant to be immaterial. The advisory committee note to § 803 states "The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify the non-production of the declarant in person at the trial even though he may be available." \textit{Fed. R. Evid.} 803(1)-(24).

Additionally, two of the Code's hearsay exceptions, § 1240, spontaneous declarations, and § 1223, statements of co-conspirators, do not require unavailability because such statements derive their value from the out-of-court context in which the statement was spoken. Thus, the hearsay statement is actually preferable to the available declarant's trial testimony. Randolph N. Jonakait, \textit{Restoring the Confrontation Clause to the Sixth Amendment}, 35 \textit{UCLA L. Rev.} 557, 561-63 (1988).

\textsuperscript{134} \textit{Cal. Evid. Code} § 1370 (West 1997). Section 1370 (a)(3) states "The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements more than five years before the filing of the current action or proceeding shall be inadmissible under this section." \textit{Id.}

\textsuperscript{135} \textit{McCormick, supra} note 31, § 289, at 500.

\textsuperscript{136} \textit{Cal. Evid. Code} § 1370 (West 1997). Section 609 of the Federal Rules of Evidence, impeachment by evidence of conviction of crime contains a similar time limit. Section 609 (b) states:

\begin{quote}
Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness
\end{quote}
4. Trustworthiness Of The Declarant And The Statement

Section 1370’s fourth requirement is that the statement must be trustworthy. Section 1370 suggests criteria that the courts may use in evaluating the trustworthiness of the statement. These criteria which focus on the declarant, include, but are not limited to, whether the statement was made in contemplation of pending or anticipated litigation in which the declarant had an interest, and whether the declarant had any other bias or motive for fabricating the statement.

Another factor which § 1370 suggests the courts may use in evaluating trustworthiness is whether the statement is corroborated by evidence other than the statements that are admissible only pursuant to § 1370. This last factor focuses on the surrounding circumstances, rather than the declarant, and considers whether other evidence supports the truth of the

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137. CAL. EVID. CODE § 1370 (West 1997). Section 1370 (a)(4) states “The statement was made under circumstances that would indicate its trustworthiness.” Id. at § 1370(b).

138. Id.

139. Id.

140. Id. McCormick, supra note 31, § 324, at 539. Section 324 states: The courts have recognized further facts which do not bear on the declarant at the time he or she was speaking, but which viewed in retrospect, tend to support the truthfulness of the statement. The most important of these is corroboration. Courts utilizing this factor have examined whether the other evidence in the case support the truth of the declaration.

Id.
5. Recording The Statement

Fifth, § 1370 requires the statement be written, electronically recorded or have been made to a law enforcement official. Requiring the declarant who experienced the abuse or threat of abuse to personally record the statement, ensures trustworthiness and accuracy. In the alternative, the declarant may allow a law enforcement official to record the statement. The statement remains reliable because the official is under a duty to accurately and truthfully report the statement.

6. Notice

Finally, § 1370 requires the party offering the evidence to give sufficient notice to the adverse party of their intention to use the statement. The proponent of the evidence must give the particular details of the statement to allow the adverse party a fair opportunity to prepare to meet the statement. While strict compliance with similar notice requirements has sometimes been enforced, courts generally will tend to overlook this type of requirement if the need for the hearsay arises on the eve of, or during trial when possible injustice is avoided by the offer of a continuance or other measures.

141. Id.
142. CAL. EVID. CODE § 1370 (West 1997). Section 1370 (a)(5) states “The statement was made in writing, was electronically recorded, or made to a law enforcement official.” Id.
144. CAL. EVID. CODE § 1370 (West 1997).
146. CAL. EVID. CODE § 1370 (West 1997).
147. Id. Section 1370 (c) states:
   A statement is admissible pursuant to this section only if the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to meet the statement.
   Id.
148. McCormick, supra note 31, § 324, at 539. E.g., United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976) (The government’s failure to give formal pretrial
Even if a victim's hearsay statement of physical abuse complies with the six requirements of § 1370, such evidence is not automatically admissible. To be admitted the proponent must show the evidence is relevant. If the opposing party objects on the grounds that it is unduly prejudicial to the defendant, the proponent must show the probative value is greater than the prejudicial effect. In a criminal proceeding, the proponent faces additional challenges under the California Constitution's Confrontation Clause.

1. California Evidence Code § 350

Pursuant to § 350 of the Code, the proponents of hearsay evidence admissible under § 1370 must show the relevancy of the statements. A proponent of such evidence might offer the statements of physical abuse to prove the defendant murdered the declarant, or demonstrate the nature of the relationship between the declarant and the defendant. To be relevant, the evidence of physical abuse must be material to the issues specific to the particular case and tend to establish the proposition that it is offered to prove. However, even if the evidence is relevant, and complies with § 1370, the judge could still refuse to admit such evidence based on other statutory restrictions.
2. California Evidence Code § 352

Pursuant to § 352 of the Code, in civil and criminal proceedings, the trial judge has discretion to exclude the relevant evidence admissible under § 1370 when the probative value is outweighed by the undue prejudice it may cause the defendant. Such evidence is that which necessitates undue consumption of time, creates substantial danger of undue prejudice, confuses the issues, or misleads the jury. Section 352 also applies to evidence which produces an emotional bias against the defendant and has little effect on the issues in the case.

However, § 1370 does not place limitations on the use of the evidence. Such permissible uses include, but are not limited to, proving the defendant carried out the threats and murdered the declarant, proving the declarant's or the defendant's state of mind, proving the defendant's past acts, as well as explaining the conduct of the declarant or the nature of the relationship between the declarant and the defendant. Moreover, § 1370 permits using the evidence for purposes prohibited under § 1250. For example, § 1370 allows the evidence to prove the state of mind of the declarant when it is not at issue and to prove the defendant's past acts. As a result, a defendant cannot argue that using the evidence to directly prove the truth of the charges is unduly prejudicial and thus barred from admission under § 352. However, a defendant may still argue that the evidence is unduly prejudicial because it is

157. CAL. EVID. CODE § 352 (West 1996). Section § 352, discretion of the court to exclude evidence states "The court in its discretion may exclude evidence if its probative value is outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Id.

158. Id.


161. CAL. EVID. CODE § 1370 (West 1997).

162. CAL. EVID. CODE § 1370 (West 1997). Section 1370 contains no limitations on the use of evidence of physical abuse. Id.

163. CAL. EVID. CODE § 1250 (West 1996). Section 1250 limits using the evidence to prove the state of mind of the declarant when it is issue in the case or to prove the declarant's acts in conformity with the statement. Section 1250 prohibits using the evidence to prove the defendant's past acts. Id.
cumulative, unduly time consuming, or confuses or inflames the jury.\textsuperscript{164}

3. California Constitution and The Confrontation Clause

The legislature intended § 1370 to be consistent with the criminal defendant's constitutional right to confront witnesses.\textsuperscript{165} However, under \textit{Wright},\textsuperscript{166} newly created statutory hearsay exceptions are presumptively unreliable and inadmissible under the Confrontation Clause unless the prosecution shows the statement possesses particularized guarantees of trustworthiness.\textsuperscript{167} Trustworthiness is shown when the evidence fits under a long established hearsay exception,\textsuperscript{168} or when the declarant and the surrounding circumstances are trustworthy.\textsuperscript{169}

At the time of this writing, § 1370 has been in existence for less than a year,\textsuperscript{170} no related federal hearsay exception exists,\textsuperscript{171} and such an exception is not recognized by other states.\textsuperscript{172} Thus § 1370 does not qualify as a firmly rooted

\begin{footnotes}
\item[164] CAL. EVID. CODE § 352 (West 1997).
\item[166] Idaho v. Wright, 497 U.S. 805 (1990).
\item[167] \textit{Id.} at 818.
\item[168] \textit{Id.} at 817. The trial court admitted the hearsay evidence under the Federal Rules of Evidence hearsay exception § 803 (24) Other exceptions. The United States Supreme Court held that this residual exception sharply contrasts with firmly rooted hearsay exceptions by accommodating ad hoc instances in which statements not otherwise falling within a recognized exception might nevertheless be admissible at trial. \textit{Hearsay statements admitted under § 803(24) of the Federal Rules of Evidence almost by definition do not satisfy the same tradition of reliability supporting the admissibility of statements under a firmly rooted hearsay exception.} \textit{Id.}
\item[169] \textit{Id.} at 815. B.E. \textsc{Within}, \textsc{California EvidenCe}, § 815, at 781 (Bancroft-Whitney 1986). Section 815 explains that this limitation considers such factors as whether the statement is made before the controversy arose and whether the declarant has a motive to falsify. \textit{Id.}
\item[170] White v. Illinois, 502 U.S. 346, 355-56 n.8 (1992). The \textit{White} court considered two hearsay exceptions which had been in existence over two centuries, as \textit{"firmly rooted."} \textit{Id.}
\item[171] FED. R. EVID. 803-804.
\item[172] A Westlaw search for a similar physical abuse hearsay exception in Washington, Oregon, and New York found no such exception in either case law or statute. For example, in \textit{People v. Asmar}, a New York court refused to admit a victim's hearsay statements of fear of the defendant and other statements relating the physical abuse inflicted upon the declarant by the defendant. \textit{People v. Asmar},
\end{footnotes}
hearsay exception. As a result, hearsay statements falling under § 1370 are presumed invalid and inadmissible under the Confrontation Clause unless the proponent shows the declarant and the circumstances surrounding the statement of physical abuse are trustworthy.

C. APPLYING HEARSAY EXCEPTION § 1370

1. People v. OJ Simpson

In the Simpson criminal trial, the court refused to admit seven hearsay statements by Nicole Brown Simpson which recounted her fear of OJ Simpson, and both actual and threatened physical abuse by OJ Simpson, because they did not conform to any of the current hearsay exceptions.

The prosecution offered this evidence under the Code § 1250, state of mind hearsay exception, arguing that Nicole Brown Simpson's state of mind was learned helplessness.


173. See supra note 43.


175. People v. Simpson, No. BA097211, 1995 WL 21768, at *4-5 (Cal. Super. Doc. Jan. 18, 1995) The following hearsay statements were excluded from the Simpson criminal trial:

(1) A 1986 diary entry containing a graphic description of the physical abuse Nicole Brown Simpson suffered at the hands of the defendant. The diary states, “He (defendant) beat me up so bad that he tore my blue sweater and blue slacks completely off me.” Id at *4.

(2) In 1989, Nicole Brown Simpson told Kris Jenner that the defendant would kill her if she ever left him. Id.

(3) In 1993 Nicole Brown Simpson told D'Anne LeBon that she lived in fear of the defendant and that “Everywhere I go, he shows up. I really think he's going to kill me.” Id. at *4.

(4) In 1994, Nicole Brown Simpson told her mother, “He (defendant) is following me. I'm driving and he's behind me.” Id.

(5) In 1994 Nicole Brown Simpson told Betty Rockett that she was planning to move from the Bundy address because the defendant was “nuts.” She also said “OJ's watching me,” and that the defendant was peeping in windows again and using disguises to follow her. People v. Simpson, No. BA097211, 1995 WL 21786, *4 (Cal. Super. Doc.).

(6) Nicole Brown Simpson told Denise Brown that she was afraid of the defendant and that he told her, “I have no reason to live now.” Id.

(7) In 1994, five days before Nicole Brown Simpson's murder, a woman identifying herself only as "Nicole" from West Los Angeles called a battered women's hotline complaining that her ex-husband was stalking her and that she feared him. Id.

However, the trial court found that Nicole Brown Simpson's state of mind was not at issue and the defendant had not raised any issue concerning her conduct prior to the homicide.\(^{177}\) The Simpson trial court reiterated that the California Supreme Court clearly held that it was reversible error to admit hearsay statements by a homicide victim expressing fear of the defendant, even when made on the very day of the murder.\(^{178}\) Thus, the seven hearsay statements by Nicole Brown Simpson were not admissible under § 1250.\(^{179}\)

Moreover, the court held that, had the statements been admissible under hearsay exception § 1250, the statements still could not withstand a § 352 objection because the prejudice of the statements outweighed their probative value.\(^{180}\)

2. OJ Simpson Civil Wrongful Death Trial and the Admissibility of Hearsay Evidence Under § 1370

Although § 1370 was intended for use in the Simpson civil trial, the Simpson civil court\(^{181}\) would have most likely found

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\(^{178}\) Id.
\(^{179}\) Id.
\(^{181}\) Brown, Goldman, Rufo v. Simpson, No. SC036876, SC036340, SC031947,
Nicole Brown Simpson’s hearsay statements inadmissible under § 1370 due to the statements’ inability to meet the requirements.

The 1986 diary entry fails to meet § 1370’s requirement that the statements be made within five years of the filing of the current action.\textsuperscript{182} The five statements in which Nicole Brown Simpson told her friends, her sister and her mother that she lived in fear of the defendant and that she thought he was going to kill her, fail the requirement that the statements narrate, describe or explain the infliction or threat of physical injury on the declarant.\textsuperscript{183} These statements merely describe her fear of the defendant and her belief that he would kill her.\textsuperscript{184} The statements do not reiterate any specific threats or infliction of physical abuse.\textsuperscript{185} In addition, Nicole Brown Simpson made the statements to her friends, sister and mother,\textsuperscript{186} and therefore fail to meet § 1370’s requirement that the statement be in writing, electronically recorded, or made to a law enforcement official.\textsuperscript{187}

The hearsay evidence in which a woman who identified herself only as “Nicole” called a battered women’s hotline and expressed her fear of her ex-husband was not offered by the plaintiffs in the civil trial under § 1370.\textsuperscript{188} However, the


\textsuperscript{183} CAL. EVID. CODE § 1370 (West 1997).


\textsuperscript{185} \textit{Id.}

\textsuperscript{186} \textit{Id.}

\textsuperscript{187} CAL. EVID. CODE § 1370 (West 1997).

\textsuperscript{188} Brown, Goldman, Rufo v. Simpson, No. SC036876, SC036340, SC031947, 1996 WL 694142, at *1-12 (Cal. Super. Doc. Dec. 14, 1996). The judge in the Simpson civil trial admitted the hotline operator’s testimony under § 1250, state of mind hearsay exception. The operator testified that the caller told her that she feared her ex-husband, that he had been stalking her, that he had beaten her, and that he threatened to kill her. The plaintiffs offered this evidence under § 1250 to show Nicole Brown Simpson’s state of mind, that she feared the defen-
statements would probably not have been admissible under that section because it was unknown if the threats were made at or near the time of the phone call.\textsuperscript{189} Again, the statements were not in writing, electronically recorded or made to a law enforcement official.\textsuperscript{190}

IV. CONCLUSION

Although § 1370 was passed to be available for the use in the Simpson civil trial, it was never used in that trial, and at the time of this writing, § 1370 has yet to be applied in other California courts of law. Although 1370's effect on the law of evidence is unknown, this Comment indicates the potential of this new exception. Section 1370's requirements are numerous and strict, but they are necessary to ensure the admission of only reliable hearsay statements of physical abuse. However, once the evidence complies with the specific requirements of § 1370 and any other applicable statutory or constitutional requirement, § 1370 becomes an invaluable evidentiary tool through which evidence may reach the jury. Section 1370's potential lies in the unlimited use for which the evidence of physical abuse may be admitted. In particular, § 1370 allows using the evidence for all purposes, including proving the defendant carried out the threats and murdered the victim, a use strictly forbidden under § 1250, the state of mind hearsay exception.\textsuperscript{191}

The author of the bill proposing § 1370 expressed high expectations for the new exception.\textsuperscript{192} It is clear that in cases...
where the evidence complies with the requirements of § 1370, and any other applicable requirement under the Code or the California Constitution, § 1370 is capable of meeting those expectations.

Karleen F. Murphy

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