

# Balancing the Anonymity of Threatened Witnesses Versus a Defendant’s Right of Confrontation: The Waiver Doctrine After *Alvarado*

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## I. INTRODUCTION

Around noon in a county jail, an inmate is murdered, brutally stabbed to death.<sup>1</sup> Three other inmates witness some of the events surrounding the murder. After the murder, these witnesses are threatened, attacked, and intimidated.<sup>2</sup> Their lives are in danger if their identities are

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1. Alvarado v. Superior Court, 5 P.3d 203, 206 (Cal. 2000) (“On February 6, 1993, during the noon hour, Jose Uribe, an inmate at the Los Angeles County jail, was killed in his cell, having been stabbed 37 times with a contraband knife described as a shank.”).

2. See *id.* at 206–08.

A witness in the instant case was attacked and cut in jail after the killing in this case. The attacker was a member of the prison gang aligned with the Mexican Mafia and warned the witness not to testify. One of the defendants in this case threatened a witness while the witness was in protective custody and told the witness somebody would get him. Someone wrote on a wall while a witness was in a court holding cell that the witness was dead. And that the witness was a snitch at the time when the witness was in protective custody.

disclosed because the Mexican Mafia, a notorious prison gang, is allegedly involved in the murder.<sup>3</sup> Because of this danger, the trial court grants the prosecutor's request to permanently withhold the witnesses' identities from the defense.<sup>4</sup> On appeal, this ruling is reversed.<sup>5</sup> The California Supreme Court holds that the identities of these crucial witnesses<sup>6</sup> for the prosecution must be disclosed to the defense at trial, despite the fact that they have been attacked and threatened by the defendant and that such disclosure will pose a significant danger to the witnesses' safety.<sup>7</sup> To withhold the identities of witnesses whose

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*Id.* at 208. "Witness 1 further testified [before the grand jury] . . . that on the day immediately preceding his testimony before the grand jury, he was placed in the same jail cell as defendant Alvarado, who threatened to harm him if he testified." *Id.* at 206–07. It is unclear from the *Alvarado* opinion if each of the three witnesses were threatened or if the descriptive facts set forth above pertained to only one or two of the three witnesses.

3. *Id.* at 207 ("The homicide is believed to have been ordered by the Mexican Mafia, a notorious prison gang . . .").

4. *Id.* at 208 (stating the trial court's finding that "[b]ased on the foregoing and the other facts disclosed to the court in camera, it is clear that the witnesses 1 through 3 are in danger and that disclosure of their names would increase the risk of possible danger to them . . .").

5. *Id.* at 223.

6. The phrase "crucial witnesses" is not defined in the California Supreme Court's opinion. However, in the court of appeal opinion, which was superseded, the court described crucial witnesses as those "without whom the state has no viable case" and who are not "peripheral, cumulative, or minor." *Alvarado v. Superior Court*, 60 Cal. Rptr. 2d 854, 861 (Ct. App. 1997), *rev'd*, 5 P.3d 203 (Cal. 2000). The terms "victim" and "witness" will be used interchangeably in this Article, and the use of one term will necessarily be intended to include the other. Furthermore, the issue addressed herein is limited to crucial witnesses as defined in this paragraph.

7. *See Alvarado*, 5 P.3d at 205.

[T]he trial court and the Court of Appeal erred in determining that, when the risk to a witness is sufficiently grave, the identity of the witness may be *permanently* withheld from a defendant and the witness may testify *anonymously at trial* even when the witness is a crucial prosecution witness and withholding the witness's identity will impair significantly the defendant's ability to investigate and cross-examine the witness.

*Id.*

Thus, under the cases discussed above, should the witnesses provide such crucial testimony at trial, the confrontation clause would prohibit the prosecution from relying upon this testimony while refusing to disclose the identities of the witnesses under circumstances in which such nondisclosure would significantly impair the defense's ability to investigate or effectively cross-examine them.

*Id.* at 220; *id.* at 221 ("At *trial*, however, the confrontation clause imposes greater demands upon the prosecution in that defendants must be afforded an adequate opportunity to confront and cross-examine effectively the witnesses who testify against them."); *id.* at 223 ("Thus, when nondisclosure of the identity of a crucial witness will

veracity and credibility are central to the prosecution's case would, the court concludes, significantly impair the defense's ability to effectively investigate and cross-examine the witnesses as required by the defendant's Sixth Amendment<sup>8</sup> right of confrontation.<sup>9</sup> As this Article will show, the *Alvarado* holding is very narrow, requiring disclosure only when a witness is crucial to the prosecution *and* when the witness's credibility is at issue.

The interesting issue left unresolved by *Alvarado* is whether the identity of a crucial witness whose credibility is not at issue must be disclosed to the defense at trial when the witness has been threatened and attacked by the defendant or at the defendant's behest.<sup>10</sup> Or, whether because of that intimidation, the defendant has waived his right of confrontation as to the witness's identity. This question is ripe for exploration for several reasons. First, as this Article shows, witness intimidation is a national problem.<sup>11</sup> Second, waiver by intimidation

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preclude effective investigation and cross-examination of that witness, the confrontation clause does not permit the prosecution to rely upon the testimony of that witness at trial while refusing to disclose his or her identity.”).

8. The Sixth Amendment to the United States Constitution provides, in relevant part, that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .” U.S. CONST. amend. VI.

9. The Court in *Alvarado* limited its decision to federal law. *See Alvarado*, 5 P.3d at 211 & n.5. Therefore, only federal issues will be addressed in this Article. Recently, the United States Supreme Court denied certiorari and declined to hear this case. *California v. Alvarado*, 532 U.S. 990 (2001).

10. It should be noted that even though one of the defendants in *Alvarado* had attacked one of the witnesses, at trial the prosecution proceeded on the theory that it was the Mexican Mafia, not the defendants, who were a threat to the witness's safety. *See Alvarado*, 5 P.3d at 207–08.

[T]he trial court's finding that the safety of the witnesses would be endangered by disclosure of their identities was based upon the premise that the danger to the witnesses was posed by the Mexican Mafia, *not* by the individual defendants in this case. Under this circumstance, we do not believe that the denial of disclosure can be sustained on a waiver theory.

*Id.* at 221 n.12.

11. *See id.* at 222 n.14.

At oral argument, the People pointed out that during the past five years in Los Angeles County alone, the prosecution has filed special circumstance allegations stemming from the murder of witnesses in 25 cases, is investigating 1,600 cases of witness intimidation, and “can't get witnesses to come forward in over 1,000 gang murders. Why? Because we cannot protect them [the witnesses].”

*Id.* (alteration in original); *see also* Carol J. DeFrances et al., *Prosecutors in State Courts, 1994*, in OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN 1 (1996) (reporting that across the nation “75% of the [prosecutor's] offices provided security or assistance for felony case victims or witnesses who had been threatened”); Kerry Murphy Healey, *Victim and Witness Intimidation: New Developments and Emerging Responses*, in NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, RESEARCH IN ACTION (1995) (basing the report on interviews with thirty-two criminal justice professionals from twenty urban jurisdictions regarding

was raised on appeal in *Alvarado*, but was not fully addressed, and thus not resolved.<sup>12</sup> Third, the doctrine of waiver by misconduct has a long and interesting history, which dates back to the 1600s<sup>13</sup> and continues in use to this date.<sup>14</sup> Last, but not least, this issue is certain to arise in the not so distant future.<sup>15</sup> For all of these reasons, this Article addresses the merits of the waiver doctrine as it relates to this issue. However, before that can be done, it will first be necessary to clarify the limitations of the holding in *Alvarado*, the nature and scope of the Sixth Amendment right of confrontation, and the nature of witness intimidation and witness rights, and to explore witness protection programs and what alternatives to identity disclosure, if any, exist.

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the issue of witness intimidation); NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, PREVENTING GANG- AND DRUG-RELATED WITNESS INTIMIDATION vii (1996) ("A number of law enforcement agencies and prosecutors' offices across the country have already taken steps to prevent witness intimidation.").

12. See *id.* at 221 n.12 ("Although they did not raise the issue in the trial court, the People now contend that . . . defendants, by threatening certain witnesses, waived any constitutional right to obtain disclosure of the witnesses' identities.").

13. See *Reynolds v. United States*, 98 U.S. 145, 158 (1878).

14. See *infra* Part V.A.

15. Unfortunately, only a few studies have been conducted about witness intimidation, but those results indicate its existence across the country. Witness intimidation occurs most frequently in gang cases. Since 1993, the number of gang members in California increased from 175,000 to 200,000 to 300,000 in 1999. BUREAU OF INVESTIGATION, CAL. DEP'T OF JUSTICE, CALIFORNIA GANGS BY THE NEXT MILLENNIUM 1 (1999) [hereinafter NEXT MILLENNIUM]. In addition, the analyses and trends indicate that organized crime has expanded in California and in the United States. DEP'T OF JUSTICE, STATE OF CAL., ORGANIZED CRIME IN CALIFORNIA i–iii (1998). With this proliferation and increase, the chance that this issue will arise is great.

Moreover, juveniles, who make up the majority of the members in criminal street gangs, and youth violence are expected to increase by the next decade. CAL. PENAL CODE § 13825.1 notes (a)–(n) (West 2000).

The problem of youth violence will . . . increase as the juvenile population is projected to grow substantially by the next decade. By the year 2010 the number of juveniles who are 15 to 17 years of age is expected to increase 31 percent. . . . Juvenile arrest rates for weapons-law violations increased 103 percent between 1985 and 1994, while juvenile killings with firearms quadrupled between 1984 and 1994 . . . . The number of juvenile homicide offenders in 1994 was about 2,800, nearly triple the number in 1984.

*Id.* at note (b).

Furthermore, intelligence information indicates that gang members fourteen through twenty-four years of age are the most violent and tend to commit the most gang-related homicides. That population is expected to increase by approximately thirty percent by 2006, which will result in more gang-related homicides. OFFICE OF THE ATTORNEY GEN., CAL. DEP'T OF JUSTICE, INTELLIGENCE OPERATIONS BULLETIN 2 (2000).

## II. UNDER *ALVARADO*, DISCLOSURE OF A THREATENED WITNESS'S IDENTITY IS MANDATED ONLY WHEN CERTAIN FACTORS ARE PRESENT

### A. Introduction

The *Alvarado* court's decision that withholding the identity of crucial prosecution witnesses from the defense at trial is unconstitutional is narrow in scope and only applies when certain circumstances are present. The *Alvarado* court did not decide the interesting question left open by the United States Supreme Court in *Smith v. Illinois*,<sup>16</sup> namely, whether the Sixth Amendment is violated when the identity of a threatened witness is withheld from the defense at trial, when credibility issues are not extant.<sup>17</sup>

### B. The Facts of Alvarado

#### 1. The Murder

*Alvarado* involved a prison murder. The defendants, the victim, and the three witnesses were all inmates in county jail at the time of the homicide.<sup>18</sup> The two defendants, Joaquin Alvarado and Jorge Lopez,

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16. *Smith v. Illinois*, 390 U.S. 129 (1968).

17. In *Smith*, the United States Supreme Court held that a defendant's Sixth Amendment right of confrontation was violated when the defense was denied the right to ask the real name and address of one of the prosecution's witness. *See id.* at 131. There was no evidence that the witness in *Smith* had been threatened by the defendant. *See id.* at 134. In his concurring opinion, Justice White intimated that cross-examination of a witness may be limited by the trial judge when it would endanger the safety of the witness.

In *Alford v. United States*, the Court recognized that questions which tend merely to harass, annoy, or humiliate a witness may go beyond the bounds of proper cross-examination. I would place in the same category those inquiries which tend to endanger the personal safety of the witness. But in these situations if the question asked is one that is normally permissible, the State or the witness should at the very least come forward with some showing of why the witness must be excused from answering the question. The trial judge can then ascertain the interest of the defendant in the answer and exercise an informed discretion in making his ruling. Here the State gave no reasons justifying the refusal to answer a quite usual and proper question.

*Id.* at 133–34 (White, J., concurring) (citation omitted).

18. *See Alvarado*, 5 P.3d at 206–07. The case came before the court of appeal by a writ of mandate, filed by the defendants, after the trial court authorized permanent nondisclosure of the witnesses' identities. The court of appeal affirmed the trial court's ruling, and the defendants then filed a petition for review before the California Supreme Court. *See id.* at 208–10. The only facts stated in the opinion are those recounted from the grand jury transcript of proceedings, which is summarized in the opinion. The grand jury proceedings were held in lieu of a preliminary hearing. *See id.* at 208–09.

were charged with the murder of inmate Jose Uribe.<sup>19</sup> According to the grand jury testimony, the victim, Jose Uribe, was housed in cell ten. The three witnesses are referred to in the transcript of the testimony as witnesses one, two, and three.<sup>20</sup> Witnesses one and two were housed, respectively, in cells twelve and eleven. Witness three was a jail trusty, assigned to sweep the cell module in which the murder occurred.<sup>21</sup>

Before lunch, on the day of the murder, witness one saw Frank Marquez at his cell and heard Marquez ask one of witness one's cellmates for some extra jail clothing. He also heard Marquez say something about a snitch. Because witness one wanted to curry favor with the Hispanic inmates, he gave his own shirt to Marquez. During lunch, witness one remained in his cell. He saw Marquez, Alvarado, Lopez, and two other inmates near his cell. He then heard an altercation, and afterward saw the same five inmates leave the area.<sup>22</sup>

On the morning of the same day, witness two saw Marquez arrive at his cell and heard Marquez talk to his cellmates. Marquez told witness two that "a snitch was going to be dealt with in cell No. 10" and that witness two should "stay away from cell No. 10."<sup>23</sup> About ten minutes later, witness two heard a black trusty tell some black inmates to stay away from the end of the row, which is where cell ten was located. Witness two also remained in his cell during lunch. Around noon, witness two saw Alvarado and Lopez enter cell ten with a third inmate and thereafter heard a fight. He heard someone say something about being a snitch. Immediately thereafter, witness two saw Lopez give a bloody shirt to Marquez, who was standing outside cell ten. He also saw a bloody body lying under one of the beds in cell ten.<sup>24</sup> This bloody body was that of Jose Uribe, who had been stabbed 37 times with a prison knife, also known as a shank.<sup>25</sup>

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19. *Id.* at 206. A third defendant, Frank Marquez, a jail trusty, was not a co-defendant. *Id.*

20. *See id.* at 206.

21. *Id.* at 207.

22. *Id.* at 206.

23. *Id.* at 207.

24. *Id.*

25. *See id.* at 206. The California Supreme Court omitted from its statement of facts witness two's testimony that during the fight inside cell ten, other inmates made noise to drown out Uribe's cries. *See Alvarado v. Superior Court*, 60 Cal. Rptr. 2d 854, 856 (Ct. App. 1997), *rev'd*, 5 P.3d 203 (Cal. 2000). That piece of information is important, because it indicates planning, organization, and premeditation by one with sufficient power and influence to obtain cooperation from other inmates.

That same morning, witness three, the trusty, saw Marquez wrap a shank inside a shirt and give it to a Hispanic inmate. After lunch, he saw Marquez take a shirt from someone in the row of the victim's cell.<sup>26</sup>

## 2. Evidence of Witness Intimidation

During pretrial proceedings, the prosecution had ex parte hearings before the trial judge in camera. At those hearings, the prosecution presented evidence in an effort to establish good cause, under section 1054.7 of the California Penal Code,<sup>27</sup> why disclosure of the witnesses' identities should be denied.<sup>28</sup> After hearing the evidence, the trial court made several findings, one of which was that the homicide was ordered by the notorious Mexican Mafia prison gang and that the defendants, although not members, committed the murder to curry favor with the gang.<sup>29</sup>

The trial court also found that one of the witnesses to the homicide had been attacked and knifed after the homicide by a member of a gang aligned with the Mexican Mafia. The attacker had warned the witness not to testify. The trial court found that in another incident, on the day before one of the witnesses was to testify before the grand jury, Alvarado threatened the witness while the witness was in protective custody.<sup>30</sup> The court found that in a third incident, someone wrote on the wall of a witness's court holding cell that the witness "was dead," while the witness was in court.<sup>31</sup>

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26. *Alvarado*, 5 P.3d at 207.

27. California Penal Code section 1054.7 provides:

The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. "Good cause" is limited to threats or possible danger to the safety of a victim of witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.

Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. A verbatim record shall be made of any such proceeding. If the court enters an order granting relief following a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, and shall be made available to an appellate court in the event of an appeal or writ. In its discretion, the trial court may after trial and conviction, unseal an previously sealed matter.

CAL. PENAL CODE § 1054.7 (West 1985 & Supp. 2002).

28. *Alvarado*, 5 P.3d at 207.

29. *Id.*

30. *Id.* at 206–07.

31. *Id.* at 208, 209 n.2.



Even though the trial court expressed concerns about the effect of its ruling and acknowledged that the defense would not be able to investigate the witnesses without knowing their names, the court nevertheless concluded that the three witnesses were “in danger and that disclosure of their names would increase the risk of possible danger to them.”<sup>32</sup>

It should be noted that even though evidence established that one of the defendants, Alvarado, was involved in the intimidation of one of the three witnesses, the trial court named only the Mexican Mafia, and not any of the defendants, as the source of witness intimidation.<sup>33</sup> This fact becomes extremely important when considering the People’s attempt to rely on the waiver by intimidation argument discussed later.<sup>34</sup>

### 3. *The Discovery Problems*

The prosecution provided discovery to the defense which included the transcripts of the grand jury proceedings; information about the three witnesses’ custodial status; the module, row, and cell number of the three witnesses at the time of the homicide; the three witnesses’ prior criminal histories and police reports of their prior crimes; copies of interviews with other inmates; the names and photographs of thirty-three other inmates who were in the module where the killing occurred on that day; and the names of all inmates who were in a nearby county jail module.<sup>35</sup> But the prosecution did not give the witnesses’ true names, nor their photographs to the defense.<sup>36</sup>

The defense maintained that without knowing the witnesses’ identities, they would not be able to effectively cross-examine the witnesses at trial for the following reasons:

[The defense] will be unable to determine whether the witnesses (1) were present at the time and place of the killing, (2) harbored grudges against either or both defendants, (3) had a motive to kill the victim themselves and accuse defendants in order to dispel suspicion from themselves, (4) made inconsistent statements to others regarding relevant aspects of the case, and (5) had reputations for dishonesty.<sup>37</sup>

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32. *Id.* at 208.

33. *See id.* at 207–08, 209 n.2, 221 n.12.

34. *See id.* at 221 n.12.

35. *Alvarado v. Superior Court*, 23 Cal. 4th 1121, 1128 n.2 (Cal. 2000) (reporting information that was deleted from the opinion published in the *Pacific Reporter*).

36. *Alvarado*, 5 P.3d at 207.

37. *Id.* at 221.

The California Supreme Court agreed with the defendants' contentions. It found that without the sought-after information, the defendants would be precluded from having information necessary for effective cross-examination.<sup>38</sup>

For these reasons, the *Alvarado* court vacated the trial court's order, which allowed the prosecution permanently to withhold the identity of its three witnesses from the defense.<sup>39</sup> It further ordered the trial court to fashion a new order consistent with the court's expressed conclusions, which could deny, restrict, or defer "disclosure of the identity of each witness *before* trial . . . as long as that order does not impermissibly impair defendants' right to confront and cross-examine the witnesses effectively *at trial*."<sup>40</sup> Thus, assuming all circumstances are the same on remand, the identity of the witnesses must be given to the defendants at trial.<sup>41</sup>

*C. The Identity of Crucial Witnesses, Whose Credibility Is at Issue, Must Be Disclosed*

Without a doubt, the *Alvarado* decision is a narrow one, limited to those cases where credibility of crucial prosecution witnesses is at issue. As will be shown, this view is supported by the cases the court cited in its opinion, the factual nature of the case itself, and the express statements of the court.

In reaching its decision, the California Supreme Court relied mainly on the *Smith* case.<sup>42</sup> Not once, but twice, the court quoted the same passage from *Smith* to the effect that when credibility is the main issue, a witness may not testify anonymously:

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38. The California Supreme Court quoted at length from the court of appeal opinion about the difficulties involved:

[D]efense counsel "will have difficulty obtaining complete information about the witnesses' location and ability to observe and testify about the crime[,] . . . [and] will be unable to [obtain] complete impeaching information, such as the witnesses' reputation for truthfulness or dishonesty, previous history and accuracy of providing information to law enforcement, and other motives to fabricate, such as revenge or reduction or dismissal of their own charges." Indeed, without access to either the witnesses' names or their photographs, defense counsel are unlikely to be able to conduct an adequate investigation of the witnesses or of the veracity of their testimony, or challenge the accuracy of the information concerning the witnesses provided by the prosecution, including their prior criminal records or the benefits that may have been provided to them in return for their testimony.

*Id.* (alteration in original).

39. *See id.* at 206, 221, 223.

40. *Id.* at 206.

41. *See id.* at 223.

42. *See id.* at 206, 215 & n.8, 220 n.11.

[W]hen the credibility of a witness is in issue, the very starting point in ‘exposing falsehood and bringing out the truth’ through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness’[s] name and address open countless avenues of in-court examination and out-of-court investigation. *To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.*<sup>43</sup>

The thrust of the court’s analysis throughout its opinion was that withholding the identities of the prosecution’s witnesses, when the witnesses had current and prior criminal histories, possible motives to fabricate, and questionable credibility, violated a defendant’s right of confrontation.<sup>44</sup>

The court emphasized that “[t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*”<sup>45</sup> Cross-examination is the principle mechanism by which the defense tests witness credibility and the truth of witness statements before the trier of fact.<sup>46</sup> Cross-examination is used not only to test the witness’s memory and perceptions of what occurred, but also to impeach or discredit the witness’s testimony.<sup>47</sup> One method used to impeach a witness is to confront him with the fact that he has a prior felony conviction,<sup>48</sup> which can indicate dishonesty or “moral turpitude.”<sup>49</sup> The

43. *Id.* at 205–06, 215 (alteration in original) (quoting *Smith v. Illinois*, 390 U.S. 129, 131 (1968)).

44. *See supra* note 7.

*[I]n every case in which the testimony of a witness has been found crucial to the prosecution’s case the courts have determined that it is improper at trial to withhold information (for example, the name or address of the witness) essential to the defendant’s ability to conduct an effective cross-examination.*

*Alvarado*, 5 P.3d at 219–20; *see also id.* at 220 n.11 (“Justice White’s concurring opinion in *Smith* did not suggest, however, that the testimony of a crucial witness could be admitted while withholding his or her identity, when nondisclosure of the witness’s identity would significantly impair the defendant’s ability to investigate and cross-examine the witness.”).

45. *Alvarado*, 5 P.3d at 213 (quoting *Davis v. Alaska*, 415 U.S. 308, 315–16 (1974) (quoting J. WIGMORE, *EVIDENCE* § 1395, at 123 (3d ed. 1940))).

46. *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (“Cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested.”).

47. *Id.* (“[T]he cross-examiner is not only permitted to delve into the witness’ story to test the witness’ perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness.”).

48. California Evidence Code section 788 provides, in relevant part: “For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony . . . .” CAL. EVID. CODE § 788 (West 1995 & Supp. 2002).

49. *See People v. Castro*, 696 P.2d 111, 119 (Cal. 1985) (“There is then some

theory is that one who has committed a felony that reflects a readiness to do evil is less likely than other witnesses to be telling the truth.<sup>50</sup> By impeaching the witness with his prior felony conviction, the defense has afforded the trier of fact a basis that it may use to evaluate the witness's credibility.

Cross-examination is also used to reveal any "possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues" in the trial.<sup>51</sup> Exploration of a witness's bias may be used to show either that the witness's testimony is not believable or, at the very least, that it must be carefully evaluated in light of that bias.<sup>52</sup> A prison inmate may be motivated to provide information to the authorities in exchange for special treatment, such as reduction in sentence or prosecutorial immunity, or in response to the "coercive effect of his detention."<sup>53</sup> "[P]artiality of a witness is . . . 'always relevant as discrediting the witness and [thus] affecting the weight of his testimony.'"<sup>54</sup> Defense counsel may impeach a prison inmate by showing that, because of the witness's current incarceration, the witness's testimony was an attempt to curry favor with those in power in the prison or with the authorities, or even an attempt to draw suspicion away from himself.<sup>55</sup> Exposing a witness's motivation to testify is one of the proper and important functions of cross-examination. In this way, it is possible to expose "facts from which [the] jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to

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basis . . . for inferring that a person who has committed a crime which involves moral turpitude other than dishonesty is more likely to be dishonest than a witness about whom no such thing is known.").

50. See *id.* at 118. The classic statement of the rationale for felony impeachment, written by Justice Holmes, is as follows:

[W]hen it is proved that a witness has been convicted of crime, the only ground for disbelieving him which such proof affords is the *general readiness to do evil* which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in a particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of *bad character* and unworthy of credit.

*Id.* (alteration in original) (quoting *Gertz v. Fitchburg R.R.*, 137 Mass. 77, 78 (1884)).

51. *Davis*, 415 U.S. at 316.

52. See *id.* at 319 ("Here, however, petitioner sought to introduce evidence of Green's probation for the purpose of suggesting that Green was biased and, therefore, that his testimony was either not to be believed . . . or at least very carefully considered in that light.").

53. *Alford v. United States*, 282 U.S. 687, 693 (1931).

54. *Davis*, 415 U.S. at 316 (quoting 3A J. WIGMORE, EVIDENCE § 940, at 775 (rev. by James H. Chadbourne 1970)).

55. See *Alford*, 282 U.S. at 693.

the reliability of the witness,” and hence the truth of that testimony.<sup>56</sup>

The witnesses in *Alvarado* were inmates in custody for violations of the law. The discovery given to the defense disclosed that they each had criminal histories.<sup>57</sup> If in fact any of the three witnesses were convicted of felonies, particularly felonies showing moral turpitude, these convictions would provide a basis for impeachment.<sup>58</sup> Moreover, because the three inmates were convicts, their credibility automatically becomes one of the prime areas for the defense to explore. Their status as convicts alone suggests that they might have testified before the grand jury in order to get favorable treatment for their current charges. In the same vein, the defense would be obligated to investigate whether in the past they had testified for the prosecution, and, if so, whether they received a benefit in return. Furthermore, the defense would want to explore whether any of the witnesses had worked for anyone in law enforcement in exchange for consideration. All of these inquiries are proper areas for defense counsel to explore because of the witnesses’ status as current inmates with a criminal past.

The *Alvarado* court determined that the defendants were entitled to know the identities of the prosecution’s witnesses, prison inmates whose credibility was at issue, in order to effectively cross-examine them. The court did not address whether the issue of witness safety would ever weigh in favor of nondisclosure of witness identity. As acknowledged by the court, neither of the two cases on which the court relied, *Smith*<sup>59</sup> and *Alford*,<sup>60</sup> addressed the issue of witness safety.<sup>61</sup> Indeed, the court emphasized that even Justice White, in his concurring opinion in *Smith*, did not argue that a witness’s identity should be withheld because of safety concerns when the witness’s credibility is a major issue.<sup>62</sup> The court stated that its decision dealt only with “defendants’ legal claims

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56. *Davis*, 415 U.S. at 318.

57. *See Alvarado*, 5 P.3d at 207, 220.

58. *See* CAL. EVID. CODE § 788 (West 1995 & Supp. 2002).

59. *Smith v. Illinois*, 390 U.S. 129 (1968).

60. *Alford*, 282 U.S. at 687.

61. *Alvarado*, 5 P.3d at 215–16 n.8 (“Neither *Alford*, nor *Smith*, addressed the question whether nondisclosure of a witness’s identity might be justified by a need to protect the safety of the witness.” (citations omitted)).

62. *See id.* at 220 n.11 (“Justice White’s concurring opinion in *Smith* did not suggest, however, that the testimony of a crucial witness could be admitted while withholding his or her identity, when nondisclosure of the witness’s identity would significantly impair the defendant’s ability to investigate and cross-examine the witness.”).

regarding the propriety of the trial court's nondisclosure order," not with the issue of witness safety and witness intimidation.<sup>63</sup>

Therefore, *Alvarado* held that a crucial witness's identity must be disclosed to the defense "at trial" when the witness's credibility is in issue.<sup>64</sup> The fact that the safety of such witnesses has been compromised and endangered is not a factor in deciding whether the right of confrontation is violated by an order of nondisclosure. The court concluded that when a crucial witness's credibility is at issue, witness safety issues must be dealt with in ways that the law provides, such as witness protection programs.<sup>65</sup> Under *Alvarado*, the identity of a witness, even one who has been threatened and attacked and whose life is in danger, must be disclosed to the defense at trial when all of the following factors are present: (1) the witness is crucial to the prosecution, (2) the witness's credibility is at issue, (3) the ability to investigate the witness will be impeded without that information, and (4) the defense will be unable to effectively cross-examine the witness.<sup>66</sup> What *Alvarado* did not decide is whether a crucial witness's identity may be withheld from the defense when the witness has been attacked or intimidated by the defendant or at his behest and the witness's credibility is *not* in issue.

Despite its limited application, *Alvarado* opens up numerous problems for both the prosecution and the defense. Although *Alvarado* applies only to those crucial prosecution witnesses with credibility issues, one may predict that *Alvarado* will have a chilling effect on individuals reporting crimes or volunteering information about criminal activity to the police and prosecutors once they know that their identity cannot be shielded. Furthermore, the decision likely will have a deterrent effect on the willingness of threatened witnesses to testify in criminal proceedings when they are informed that the defense must know their identity.<sup>67</sup> The long-range effect is that criminals can threaten, harass, and intimidate witnesses with impunity to the detriment of societal goals of prosecuting crime and deterring criminal activity.

There are additional problems in interpreting what the phrase "at trial" means with respect to when identity disclosure must be given to the defense.<sup>68</sup> Does that mean the day of pretrial motions, the first day of jury selection, the first day of testimony, or the day the witness in question testifies? If "at trial" refers to the day the witness testifies, then

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63. *Id.* at 222 n.14.

64. *Id.* at 223.

65. *See id.* at 222–23.

66. *See supra* note 7.

67. *See infra* notes 387–409 and accompanying text.

68. *See Alvarado*, 5 P.3d at 221–22.

a number of logistical problems are presented for the defense. The prospect of obtaining such information on the day of the witness's testimony would most likely require a request for a continuance in order to adequately investigate the background of the witness. In turn, the question arises how one qualifies a jury when one does not know how long the investigation will take, if out-of-state witnesses might be required, or if necessary witnesses are unavailable at the time of trial. Furthermore, how does one voir dire a jury when one does not have all the information about the criminal case, and will not have this information until the investigation into all of the witnesses' backgrounds are completed? The investigation could lead to the necessity of further research, or the possibility of unexplored defenses. All of these possibilities could result in serious logistical problems for the defense, possible mistrials, and delays for the trial courts.

Still more problems are presented by the *Alvarado* court's suggestion that witness protection programs are sufficient to assist threatened witnesses.<sup>69</sup> These and other issues are discussed in this Article. First, however, the nature and scope of the Sixth Amendment right of confrontation and its historical origins must be addressed.

### III. THE RIGHT OF CONFRONTATION

#### A. Introduction

In less than twenty words, the architects of our Constitution created one of our most important trial rights: the right of confrontation. The Sixth Amendment grants to a criminal defendant the right to confront the witnesses at his trial: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."<sup>70</sup>

Although the words used are simple terms, apparently easy to understand, a great deal of controversy and analysis has evolved as to their meaning. Any attempt to interpret the Confrontation Clause must begin with the historical reasons for its existence. Understanding its historical origin assists in determining the intended purpose of the Clause and, hence, its meaning. Therefore, whether the Sixth Amendment requires disclosure of threatened unidentified material

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69. *See id.* at 222–23.

70. U.S. CONST. amend. VI. The Confrontation Clause is part of our Bill of Rights and is made obligatory on the states by the Fourteenth Amendment. *See Pointer v. Texas*, 380 U.S. 400, 403, 406 (1965).

witnesses, whose credibility is not in issue, depends upon the following factors: what specific rights are included within the amendment, the scope of those rights, whether or not there are exceptions, and what constitutes a waiver of those rights. To answer these questions, the historical origin of the Sixth Amendment will be discussed.

### B. *The Historical Origin of the Confrontation Clause*

History reveals that the Confrontation Clause came into existence because of the legal abuses that occurred in criminal trials in England prior to the seventeenth century. Its primary purpose was to prevent the trial of individuals based solely on accusations made anonymously or by the use of *ex parte* depositions or affidavits.<sup>71</sup>

It is sufficient to note that the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on “evidence” which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact.<sup>72</sup>

Around 1290, a group of English officials, known as the Privy Council, began advising the king and performing certain executive functions. By the mid-fourteenth century, the Privy Council acted as a court, holding hearings at Westminster in a room ornamented with the king’s star-shaped seal. The Privy Council came to be known as the Court of Star Chamber.<sup>73</sup> It flourished in the late sixteenth and early seventeenth centuries,<sup>74</sup> and heard cases involving, among other things, the misuse of judicial power, perjury, contempt, and forgery. Punishment ranged from torture, imprisonment, and mutilation, to the imposition of a fine.<sup>75</sup>

Defendants before the Star Chamber were required to have counsel, and the defendant’s answer to an indictment was not accepted unless signed by his counsel. If counsel refused to sign the answer, the defendant was deemed to have confessed.<sup>76</sup> If the defendant did provide an answer signed by his counsel, the court would then require the

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71. See *White v. Illinois*, 502 U.S. 346, 362 (1992) (Thomas, J., concurring) (“The Court consistently has indicated that the primary purpose of the [Confrontation] Clause was to prevent the abuses that had occurred in England.”).

72. *California v. Green*, 399 U.S. 149, 156 (1970); see also *Mattox v. United States*, 156 U.S. 237, 242 (1895) (“The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . .”).

73. *United States v. Gecas*, 120 F.3d 1419, 1446 (11th Cir. 1997).

74. *Faretta v. California*, 422 U.S. 806, 821 (1975).

75. *Gecas*, 120 F.3d at 1446.

76. *Faretta*, 422 U.S. at 821–22.



defendant to answer interrogatories submitted by his accuser.<sup>77</sup> Refusal to answer any of the interrogatories would be met with a fine of twenty shillings. If the defendant refused again, the fine would double and the defendant would be imprisoned until an answer was given. A defendant could remain in prison indefinitely for a refusal to answer these questions.<sup>78</sup>

Some authorities have stated that trials in the Star Chamber were public, but that witnesses against the accused were examined privately, with no opportunity given to the defendant to discredit them.<sup>79</sup> The accused was questioned secretly, often tortured, in an effort to obtain a confession.<sup>80</sup>

In 16th-century England, magistrates interrogated the prisoner, accomplices, and others prior to trial. These interrogations were intended only for the information of the court. The prisoner had no right to be, and probably never was, present. At the trial itself, proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his ‘accusers,’ *i.e.*, the witnesses against him, brought before him, face to face . . . . There was . . . no appreciation at all of the necessity of calling a person to the stand as a witness”; rather, it was common practice to obtain “information by consulting informed persons not called into court.”<sup>81</sup>

After the Star Chamber ended, the notion of obligatory counsel disappeared—defendants were not represented by counsel in the sixteenth and seventeenth centuries in England.<sup>82</sup> Sir Walter Raleigh’s trial for treason was in 1603, and presumably he did not have counsel.<sup>83</sup>

A crucial element of the evidence against [Raleigh] consisted of the statements of one Cobham, implicating Raleigh in a plot to seize the throne.<sup>84</sup> Raleigh had

77. *Gecas*, 120 F.3d at 1446.

78. *Id.* at 1447.

79. See *White v. Illinois*, 502 U.S. 346, 361–62 (1992); *Faretta*, 422 U.S. at 823–24 & n.21; *California v. Green*, 399 U.S. 149, 156–58 & n.9 (1970); *In re Oliver*, 333 U.S. 257, 269–70 & nn.21–22 (1948); *Gecas*, 120 F.3d at 1446–50; *United States v. Cojab*, 996 F.2d 1404, 1407 (2d Cir. 1993); Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 569–70 (1992).

80. *Oliver*, 333 U.S. at 270 n.22 (“Apparently all authorities agree that the accused himself was grilled in secret, often tortured, in an effort to obtain a confession . . . .”); see also *White*, 502 U.S. at 361; *Gecas*, 120 F.3d at 1446.

81. *White v. Illinois*, 502 U.S. 346, 361 (1992) (Thomas, J., concurring) (citations omitted) (internal quotes omitted) (alteration in original).

82. *Faretta*, 422 U.S. at 823.

83. *Green*, 399 U.S. at 157 n.10.

84. Cobham confessed as well, but it was believed that his confession had been obtained by torture. *Id.* at 157 n.22; *White*, 502 U.S. at 361–62.

since received a written retraction from Cobham, and believed that Cobham would now testify in his favor. After a lengthy dispute over Raleigh's right to have Cobham called as a witness, Cobham was not called, and Raleigh was convicted.<sup>85</sup>

Around the middle of the seventeenth century when the Puritans left England for the American colonies, a national debate arose in England about the Star Chamber and the British monarchy.<sup>86</sup> The trial of a tailor's apprentice, John Lilburne, resulted in his writing and circulating a number of documents condemning the monarchy's power. Members of the English Parliament sympathized with these writings, and in 1641, the Star Chamber was abolished.<sup>87</sup> The appellation "Star Chamber" has since become synonymous with abuses of people's rights.<sup>88</sup> Over a century later, in 1791, the Sixth Amendment was ratified.<sup>89</sup>

### C. *The Rights to Cross-Examine and Physically Confront One's Accusers Are Included in the Clause*

The historical origin of the Clause reveals that its purpose is to provide specific trial procedures to promote the reliability and the integrity of evidence presented in a criminal trial.<sup>90</sup> The drafters particularly sought to prevent trials based on unreliable hearsay. In contrast to the prior practice of trying defendants with evidence presented by unnamed witnesses and by written statements, without any opportunity to test that evidence,<sup>91</sup> it is submitted that the Clause

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85. *Green*, 399 U.S. at 157 n.10.

86. *See Gecas*, 120 F.3d at 1449.

87. *Id.* at 1449–50; *see e.g., In re Oliver*, 333 U.S. 257, 266 (1948).

88. *Alvarado v. Superior Court*, 5 P.3d 203, 214 n.7 (Cal. 2000) (citing *Faretta v. California*, 422 U.S. 806, 821 (1975)).

89. *See Oliver*, 333 U.S. at 267. The right to a public trial did not exist in this country until 1776. *See id.* at 266–67. Prior to that time, a common law requirement of confrontation had developed. *See id.* at 266–67 & n.14; *White*, 502 U.S. at 361–62 (Thomas, J., concurring) (quoting *Salinger v. United States*, 272 U.S. 542, 548 (1926)).

90. *See White*, 502 U.S. at 356–57 (“[T]he Confrontation Clause has as a basic purpose the promotion of the ‘integrity of the factfinding process.’”); *Ohio v. Roberts*, 448 U.S. 56, 65 (1980) (“[The] underlying purpose [of the Clause is] to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence . . .”).

The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that ‘the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.

*Dutton v. Evans*, 400 U.S. 74, 89 (1970) (alteration in original).

91. *See California v. Green*, 399 U.S. 149, 156 (1970).

[T]he particular vice that gave impetus to the [Confrontation Clause] was the practice of trying defendants on “evidence” which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus

mandates several changes. First, it prescribes the setting in which a criminal trial will proceed. Second, it mandates preliminary requirements as to the admission of evidence. And last, but most importantly, it provides certain rights to the accused.<sup>92</sup>

As to the first level of protection, the Clause requires a trial set in a court of law, which is meant to impress on those present both the seriousness and solemnity of the proceedings.<sup>93</sup> The second level of protection generally requires that the accused and the prosecution witnesses are present before the trier of fact.<sup>94</sup> The trier of fact, the final determiner of what in fact occurred, is able to observe the demeanor of the witnesses as they testify, thus permitting a basis for assessing their credibility.<sup>95</sup> The witness is compelled “to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.”<sup>96</sup>

The witnesses, in turn, give their statements under oath, swear to tell the truth, and their testimony is then subjected to rigorous testing.<sup>97</sup> The physical presence of the accused is meant to contribute to the reliability

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denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact.

*Id.*

92. See *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (stating that the purpose of the Confrontation Clause is served by “ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing”); *Lee v. Illinois*, 476 U.S. 530, 548 (1986) (Blackmun, J., dissenting) (stating that the Confrontation Clause advances the determination of truth “by assuring that the ‘trier of fact [has] a satisfactory basis for evaluating the truth of the [testimony]’” (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970))); *Coy v. Iowa*, 487 U.S. 1012, 1016 (1985) (stating that “the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact”).

93. See *Craig*, 497 U.S. at 845–46.

94. See *id.* at 845. As will be discussed, the presence of witnesses is not always required, because certain hearsay statements are admissible without a confrontation violation. See e.g., *Dutton*, 400 U.S. at 80; *Green*, 399 U.S. at 153, 158. Additionally, a defendant’s presence may be waived, either expressly or implicitly. *Diaz v. United States*, 223 U.S. 442, 450–51 (1912).

95. *Craig*, 497 U.S. at 845–46 (1990).

96. *Mattox v. United States*, 156 U.S. 237, 242–43 (1895).

97. See *Craig*, 497 U.S. at 846.

The combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings.

*Id.*

of the evidence by bolstering the likelihood that witnesses will tell the truth. Facing a defendant while testifying under oath impresses upon witnesses the seriousness of the matter and subjects witnesses to the penalty of perjury if they lie.<sup>98</sup> It also acknowledges the truth of the maxim that it is harder to tell a lie to another's face.<sup>99</sup>

The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness “may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. . . .” It is always more difficult to tell a lie about a person “to his face” than “behind his back.” In the former context, even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions. Thus the right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause . . . the right to cross-examine the accuser; both “ensur[e] the integrity of the factfinding process.”<sup>100</sup>

Finally, the Clause provides a third level of protection by conferring upon the accused certain rights, whether characterized as explicit, implied, or collateral.<sup>101</sup> No one will dispute that the Clause explicitly sets forth the constitutional right of a criminal defendant to confront his accusers face-to-face.<sup>102</sup> What is disputed is whether and to what extent, if any, and under what circumstances, that the right of face-to-face confrontation may be outweighed by other concerns such as public policy,<sup>103</sup> the necessities of the case,<sup>104</sup> waiver,<sup>105</sup> or hearsay objections.<sup>106</sup> Because these other concerns do exist, and because the

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98. *See id.* at 845–46.

99. *See Coy*, 487 U.S. at 1018 (“The phrase still persists, ‘Look me in the eye and say that.’”).

100. *Id.* at 1019–20 (citations omitted) (alteration in original); *see also* *Ohio v. Roberts*, 448 U.S. 56, 63 n.6 (1980) (noting that it is more difficult to lie against an accused who is present at trial).

101. *See Craig*, 497 U.S. at 862 (Scalia, J., dissenting) (“The Confrontation Clause guarantees not only what it explicitly provides for—‘face-to-face’ confrontation—but also implied and collateral rights . . .”).

102. *See Coy*, 487 U.S. at 1016 (“We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.”); *id.* at 1017 (“More recently, we have described the ‘literal right to “confront” the witness at the time of trial’ as forming ‘the core of the values furthered by the Confrontation Clause.’” (quoting *California v. Green*, 399 U.S. 149, 157 (1970))).

103. *See id.* at 1021; *Craig*, 497 U.S. at 850; *Mattox v. United States*, 156 U.S. 237, 243 (1895).

104. *Craig*, 497 U.S. at 850; *Mattox*, 156 U.S. at 243.

105. *See Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934); *Diaz v. United States*, 223 U.S. 442, 450–51 (1912); *Reynolds v. United States*, 98 U.S. 145, 158 (1878).

106. *See Williamson v. United States*, 512 U.S. 594, 598 (1994); *White v. Illinois*, 502 U.S. 346, 348–49 (1992); *Idaho v. Wright*, 497 U.S. 805, 813–14 (1990); *United States v. Inadi*, 475 U.S. 387, 391 (1986); *Ohio v. Roberts*, 448 U.S. 56, 67–68 (1980);

scope and application of this right is not specified in the Clause, a literal interpretation has been rejected in favor of the view that facial confrontation is preferred, but not required.<sup>107</sup> A literal interpretation of facial confrontation would result in the inadmissibility of all hearsay evidence, a result considered both unwarranted and extreme.<sup>108</sup>

One might assume, given the historical reasons for the Clause and its specific language, that face-to-face confrontation would be the primary right conferred on defendants. After all, it was the rejection of trial by anonymous, unsworn accusers, and trial by paper evidence, untested and unchallenged, without the accused knowing who his accusers were or seeing them in court, that gave rise to the enactment of the Clause. However, because the main purpose of the Clause is the advancement of reliable evidence, the Court's current view is that cross-examination is the essential right conferred by the Sixth Amendment.<sup>109</sup> "[T]he mission

Dutton v. Evans, 400 U.S. 74, 80 (1970); California v. Green, 399 U.S. 149, 156 (1970).

107. *Craig*, 497 U.S. at 849 ("[T]he Confrontation Clause reflects a *preference* for face-to-face confrontation at trial,' a preference that 'must occasionally give way to considerations of public policy and the necessities of the case.'" (citations omitted) (italics in original)); *id.* at 844 ("We have never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial."); *Roberts*, 448 U.S. at 64 ("The Court, however, has recognized that competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial." (citation omitted)).

For a spirited dissent and objections to this interpretation, see Justice Scalia's dissent in *Craig*, wherein he summarized and critically concluded:

This reasoning abstracts from the right to its purposes, and then eliminates the right. It is wrong because the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was "face-to-face" confrontation. Whatever else it may mean in addition, the defendant's constitutional right "to be confronted with the witnesses against him" means, always and everywhere, at least what it explicitly says: the "'right to meet face to face all those who appear and give evidence at trial.'"

*Craig*, 497 U.S. at 862 (Scalia, J., dissenting) (citations omitted).

108. *Craig*, 497 U.S. at 849 ("Given our hearsay cases, the word 'confronted,' as used in the Confrontation Clause, cannot simply mean face-to-face confrontation . . ."); *Dutton*, 400 U.S. at 80 ("It is not argued, nor could it be, that the constitutional right to confrontation requires that no hearsay evidence can ever be introduced."); *Wright*, 497 U.S. at 813 ("From the earliest days of our Confrontation Clause jurisprudence, we have consistently held that the Clause does not necessarily prohibit the admission of hearsay statements against a criminal defendant, even though the admission of such statements might be thought to violate the literal terms of the Clause."); *Bourjaily v. United States*, 483 U.S. 171, 182 (1987) ("While a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable, this Court has rejected that view as 'unintended and too extreme.'").

109. See *Craig*, 497 U.S. at 845.

of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that ‘the trier of fact [has] a satisfactory basis for evaluating the truth [of the witness’s testimony].’”<sup>110</sup> Through cross-examination, this mission is accomplished.

Cross-examination is permitted not only to explore the witness’s account of the events, but also to test the witness’s perception and memory, and to impeach or discredit the witness.<sup>111</sup> Through cross-examination, it is possible to show that a witness is biased, or that the testimony is exaggerated or not believable.<sup>112</sup> Moreover, a witness’s expectation of leniency on a pending criminal case in exchange for his testimony, or even for immunity from prosecution, are proper areas subject to cross-examination.<sup>113</sup> When the prosecution’s case depends upon “testimony of individuals whose memory might be faulty or who . . . [might be] motivated by malice, vindictiveness, intolerance, prejudice, . . . jealousy,” or revenge, cross-examination is available to expose those biases and infirmities.<sup>114</sup>

Cross-examination is also available to identify the witness “with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood” for purposes of

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The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. The word “confront,” after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness.

*Id.* “Although face-to-face confrontation forms ‘the core of the values furthered by the Confrontation Clause’ we have nevertheless recognized that it is not the *sine qua non* of the confrontation right.” *Id.* at 847 (citation omitted). “[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities . . . through cross-examination . . .” *Id.* (alteration in original) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985)). “The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*” *Delaware v. Fensterer*, 474 U.S. 15, 19–20 (1985) (quoting 5 J. WIGMORE, EVIDENCE § 1395, at 123 (3d ed. 1940)). “The Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that ‘a primary interest secured by [the provision] is the right of cross-examination.’” *Roberts*, 448 U.S. at 63 (alteration in original) (footnote omitted) (quoting *Douglas v. Alabama*, 380 U.S. 415, 418 (1965)).

110. *Dutton*, 400 U.S. at 89 (second alteration in original) (quoting *California v. Green*, 399 U.S. 149, 161 (1970)); *see also Inadi*, 475 U.S. at 396 (stating that the “Confrontation Clause’s very mission . . . is to advance the accuracy of the truth determining process in criminal trials” (internal quotes omitted) (quoting *Tennessee v. Street*, 471 U.S. 409, 415 (1985) (quoting *Dutton*, 400 U.S. at 89))).

111. *See Fensterer*, 474 U.S. at 19; *Roberts*, 448 U.S. at 71.

112. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 51–52 (1987).

113. *See Alford v. United States*, 282 U.S. 687, 693 (1931).

114. *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

impeachment or bias.<sup>115</sup> Because it is unknown in advance what responses will actually be obtained, wide latitude is given in cross-examination.<sup>116</sup> But that latitude is not without limits. Although an accused has a right to cross-examination, the trial court also has a duty to protect a witness from questions that go beyond the scope of proper cross-examination, such as questions intended to harass, annoy, or humiliate a witness.<sup>117</sup> Moreover, “inquiries which tend to endanger the personal safety of the witness,”<sup>118</sup> upon a proper showing, are considered improper.<sup>119</sup>

Many of the cases that deal with Sixth Amendment confrontation involve improper limitations on the scope of cross-examination.<sup>120</sup> However, “[c]ross-examination is not improperly curtailed if the jury is in possession of facts sufficient to make a ‘discriminating appraisal’ of the particular witness’s credibility.”<sup>121</sup> Indeed, a defendant’s right to cross-examination is not without limits. “Defendants cannot run roughshod, doing precisely as they please simply because cross-examination is underway. So long as a reasonably complete picture of the witness’s veracity, bias, and motivation is developed, [the trial court has the] power and discretion to set appropriate boundaries.”<sup>122</sup> Nevertheless, when credibility is in issue, cross-examination may be used to inquire into the witness’s background, identity, and community.<sup>123</sup> But even under these circumstances, there is no fixed rule, and disclosure will depend on the particular case, balancing the public

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115. *Alford*, 282 U.S. at 691.

116. *Id.* at 692.

117. *Id.* at 694.

118. *Smith v. Illinois*, 390 U.S. 129, 133–34 (1968) (White, J., concurring).

119. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (“[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, [and] the witness’ safety . . .”).

120. *See Coy v. Iowa*, 487 U.S. 1012, 1016 (1988).

121. *United States v. Sasso*, 59 F.3d 341, 347 (2d Cir. 1995) (quoting *United States v. Roldan-Zapata*, 916 F.2d 795, 806 (2d Cir. 1990) (quoting *United States v. Singh*, 628 F.2d 758, 763 (2d Cir. 1980))).

122. *United States v. Boylan*, 898 F.2d 230, 254 (1st Cir. 1990).

123. *See Smith*, 390 U.S. at 131 (“Yet when the credibility of a witness is in issue, the very starting point in ‘exposing falsehood and bringing out the truth’ through cross-examination must necessarily be to ask the witness who he is and where he lives.” (footnote omitted)); *Alford*, 282 U.S. at 692 (“Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.”).

interest in nondisclosure against the defendant's interest.<sup>124</sup> This is so even when there is a material witness and credibility is in issue, because other considerations, such as witness safety, may have an impact on the disclosure of the witness's identity.<sup>125</sup> This subject is dealt with in depth, as is the subject of waiver, in another Part.<sup>126</sup> At this point, it is sufficient to note that confrontation rights may be limited by trial judges<sup>127</sup> and public policy concerns,<sup>128</sup> and may be waived by a defendant expressly,<sup>129</sup> or by misconduct.<sup>130</sup>

#### D. *The Right of Confrontation Is Not Absolute*

Our society places a high value on human life and liberty, which is reflected in the many protections provided to defendants in criminal trials.<sup>131</sup> Those accused of crimes and those who prosecute crimes are not on equal footing. The government not only has the power of indictment, but also extensive resources for investigators, experts, and other costs associated with criminal proceedings, that far exceed those available to individuals accused of crimes.<sup>132</sup> Many of the protections of the Bill of Rights attempt to equalize the advantages between these two

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124. See *Roviaro v. United States*, 353 U.S. 53, 62 (1957).

We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

*Id.* See also *McCray v. Illinois*, 386 U.S. 300, 311 (1967) ("What *Roviaro* thus makes clear is that this Court was unwilling to impose any absolute rule requiring disclosure of an informer's identity even in formulating evidentiary rules for federal criminal trials.").

125. See *Smith*, 390 U.S. at 133 ("There is a duty to protect [a witness] from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him . . . ." (quoting *Alford v. United States*, 282 U.S. 687, 694 (1931))); *id.* at 133–34 (White, J., concurring) ("I would place in the same category those inquiries which tend to endanger the personal safety of the witness."); *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) ("On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, [and] the witness' safety . . . .").

126. See *infra* Parts IV–V.

127. *Van Arsdall*, 475 U.S. at 679.

128. See *Maryland v. Craig*, 497 U.S. 836, 844–45 (1990); *Coy v. Iowa*, 487 U.S. 1012, 1020–21 (1988) (citing *Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (citing *Mattox v. United States*, 156 U.S. 237, 243 (1895))).

129. See *Peretz v. United States*, 501 U.S. 923, 936–37 (1991); *Diaz v. United States*, 223 U.S. 442, 452–53 (1912).

130. See *Diaz*, 223 U.S. at 452; *Reynolds v. United States*, 98 U.S. 145, 158 (1878).

131. See *In re Winship*, 397 U.S. 358, 361–62 (1970).

132. *Wardius v. Oregon*, 412 U.S. 470, 480 (1973) (Douglas, J., concurring).



parties in criminal prosecutions.<sup>133</sup> These protections, such as the right of confrontation and the right to counsel, are intended to promote the integrity of the adversary process, the search for truth, and the assurance of a fair trial.

“Society wins not only when the guilty are convicted but when criminal trials are fair.”<sup>134</sup> While it is true that “[t]he dual aim of our criminal justice system is ‘that guilt shall not escape nor innocence suffer,’”<sup>135</sup> various protections ensure that the system’s aim is not achieved at the expense of fairness. A fair trial fosters confidence in the criminal system and in our government. In search of truth, criminal trials must preserve the integrity of the adversary process by fostering procedures that promote the presentation of reliable evidence and reject unreliable evidence.<sup>136</sup>

The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.<sup>137</sup>

The integrity of the adversary process is also promoted by the requirement that guilt be proved beyond a reasonable doubt.<sup>138</sup> The principle that “it is far worse to convict an innocent man than to let the guilty man go free” is reflected by this standard of proof.<sup>139</sup> The standard further protects the integrity of criminal trials by shifting the burden of persuasion to the government, reducing the risk that convictions will be based on factual error, and impressing upon the trier of fact the importance of achieving a state of subjective certainty regarding the facts.<sup>140</sup>

The Confrontation Clause also protects the integrity of the adversary process. As part of the Bill of Rights, the Confrontation Clause grants a fundamental right to the accused, which may be used as a shield to protect the accused from potential government abuses, or used as a sword to

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133. *Id.*

134. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

135. *United States v. Nobles*, 422 U.S. 225, 230 (1975) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

136. *Taylor v. Illinois*, 484 U.S. 400, 414–15 (1988).

137. *United States v. Nixon*, 418 U.S. 683, 709 (1974).

138. *See In re Winship*, 397 U.S. 358, 361–64 (1970).

139. *Id.* at 372 (Harlan, J., concurring).

140. *Id.* at 364 (quoting Norman Dorsen & Daniel A. Rezneck, *In Re Gault and the Future of Juvenile Law*, *FAM. L.Q.*, Dec. 1967, at 1, 26).

expose error and untruth.<sup>141</sup> Confrontation and cross-examination are “important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.”<sup>142</sup> Used as a weapon, cross-examination can expose a witness’s prejudice, bias, or ulterior motivation to lie;<sup>143</sup> expose falsehoods;<sup>144</sup> test a witness’s ability to perceive and to remember; impeach;<sup>145</sup> or “probe and expose . . . [infirmities], thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness’ testimony.”<sup>146</sup> Cross-examination thus “minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony.”<sup>147</sup> A “jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant’s life or liberty may depend.”<sup>148</sup> Moreover, the right of confrontation acts as a shield that “prevent[s] [constitutionally] improper restrictions on the types of questions that defense counsel may ask during cross-examination.”<sup>149</sup>

However, the rights under the Confrontation Clause may be forfeited, waived, or limited by the trial court, just as with any other constitutional right.<sup>150</sup> The privilege may be lost by consent, by an express or implied waiver, by conduct, or by misconduct.<sup>151</sup> Additionally, “the ‘necessities of trial and the adversary process’ [may] limit the *manner* in which Sixth Amendment rights may be exercised, and limit the *scope* of Sixth Amendment guarantees.”<sup>152</sup> For example, the right to confront witnesses is not the right to confront them in a way that disrupts the trial,<sup>153</sup> and the right to assistance of counsel does not include the right to consult with

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141. See *Pointer v. Texas*, 380 U.S. 400, 404 (1965).

142. *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

143. See *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

144. See *Pointer*, 380 U.S. at 404.

145. See *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985).

146. *Id.* at 22.

147. *Taylor v. Illinois*, 484 U.S. 400, 411–12 (1988).

148. *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

149. *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987).

150. See *Peretz v. United States*, 501 U.S. 923, 936 (1991) (“The most basic rights of criminal defendants are . . . subject to waiver.”).

151. See *Diaz v. United States*, 223 U.S. 442, 450 (1912) (“[T]he right of confrontation . . . is in the nature of a privilege extended to the accused . . . and that he is free to assert it or to waive it . . .” (citation omitted)); *id.* at 452 (“The view that this right may be waived also was recognized by this court in *Reynolds v. United States* . . .”).

152. *Maryland v. Craig*, 497 U.S. 836, 863 (1990) (Scalia, J., dissenting).

153. *Id.* at 864.

counsel at all times during the trial.<sup>154</sup> Additionally, an accused does not have an unrestrained right to offer testimony that is untrue, incomplete, privileged, or otherwise inadmissible.<sup>155</sup> Like the prosecution, the accused must comply with rules of procedure and evidence.<sup>156</sup> Moreover, “the Confrontation Clause [only] guarantees ‘an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’”<sup>157</sup> In fact, because the Clause has nothing to do with discovery in criminal trials, the fact that some information was not disclosed which would have made cross-examination more effective is not a violation of that right.<sup>158</sup> Thus, reasonable limitations by a trial judge on the bounds of cross-examination are not violations of the Sixth Amendment.<sup>159</sup> A trial judge may properly limit cross-examination because of concerns about “harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.”<sup>160</sup> The appropriate extent and scope of cross-examination within constitutional limits are open questions.<sup>161</sup>

In addition to limitations made by a trial court, the right is also subject to exceptions such as recognized hearsay exceptions. The exact number of these exceptions has not been delineated, and, in fact, may be enlarged.<sup>162</sup> The danger inherent in hearsay statements is that they may

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154. *Id.*

155. *See* Taylor v. Illinois, 484 U.S. 400, 410 (1988); United States v. Nobles, 422 U.S. 225, 241 (1975).

156. Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

157. Delaware v. Fensterer, 477 U.S. 15, 20 (1985) (per curiam).

158. Failure to disclose information that might have made cross-examination more effective does not undermine the purpose of the Confrontation Clause. Indeed, the Confrontation Clause has nothing to say about discovery. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 52–53 (1987). “The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.” *Id.* at 53 (footnote omitted).

159. *See* Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986); *id.* at 685 (White, J., concurring).

160. *Id.* at 679.

161. *See* Coy v. Iowa, 487 U.S. 1012, 1016 (1988).

[M]ost of this Court’s encounters with the Confrontation Clause have involved either the admissibility of out-of-court statements . . . or restrictions on the scope of cross-examination . . . . The reason for that is not . . . that these elements are the essence of the Clause’s protection—but rather, quite the contrary, that there is at least some room for doubt . . . as to the extent to which the Clause includes those elements . . . .

*Id.* (citations omitted).

162. Snyder v. Massachusetts, 291 U.S. 97, 107 (1934) (“The exceptions are not . . .

have been made under circumstances subject to none of the protections afforded by the Sixth Amendment, such as cross-examination, oath, or facial confrontation, and may thus be unreliable. Hearsay rules were developed with a view that the probability of truth is favored in certain extrajudicial statements because of the circumstances under which they were uttered.<sup>163</sup> The reasons for favoring its truthfulness vary, and may include common sense notions, such as that people tend to tell the truth when dying<sup>164</sup> or when testifying under oath.<sup>165</sup>

Because the fundamental aim of the Clause is to promote the integrity of the fact-finding process, exceptions under the hearsay rules, when they are firmly rooted and have sufficient indicia of reliability, do not violate that right.<sup>166</sup> Such hearsay exceptions include, among others, spontaneous declarations,<sup>167</sup> statements made in the course of medical treatment,<sup>168</sup> prior testimony,<sup>169</sup> a co-conspirator's statement,<sup>170</sup> and dying declarations.<sup>171</sup> As stated earlier, the test for admissibility is whether there are substantial guarantees of the trustworthiness of the statement and of the credibility of the declarant which overcome the hearsay status of the evidence.<sup>172</sup> The hearsay nature of the statements involves the fact that they were made while the declarant was not under oath, outside the courtroom, and not before the trier of fact who, thus, could not observe the person's demeanor at the time the statement was uttered.<sup>173</sup>

Two examples of firmly-rooted hearsay exceptions will demonstrate

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static, but may be enlarged from time to time if there is no material departure from the reason of the general rule.”).

163. See *Williamson v. United States*, 512 U.S. 594 (1994); *Idaho v. Wright*, 497 U.S. 805, 813–16 (1990); *Ohio v. Roberts*, 448 U.S. 56, 65–66 (1980); *Dutton v. Evans*, 400 U.S. 74, 88 (1970); *United States v. White*, 116 F.3d 903, 912 (D.C. Cir. 1997).

164. See CAL. EVID. CODE § 1242 (West 1995 & Supp. 2002) (dying declarations).

165. See CAL. EVID. CODE §§ 1290–1294 (West 1995 & Supp. 2002) (prior testimony).

166. See *White v. Illinois*, 502 U.S. 346, 355 & n.8 (1992). “We note first that the evidentiary rationale for permitting hearsay testimony regarding spontaneous declarations and statements made in the course of receiving medical care is that such out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness.” *Id.* at 358 (footnote omitted). “[F]irmly rooted” exceptions carry sufficient indicia of reliability to satisfy the reliability requirement posed by the Confrontation Clause.” *Id.* at 355 n.8.

167. See *id.* at 355–56.

168. See *id.*

169. See *California v. Green*, 399 U.S. 149, 165 (1970).

170. See *Dutton v. Evans*, 400 U.S. 74, 79, 81 (1970); *United States v. Inadi*, 475 U.S. 387, 400 (1986).

171. See *Mattox v. United States*, 146 U.S. 140, 151 (1892).

172. See *White*, 502 U.S. at 355 & n.8.

173. See *Williamson v. United States*, 512 U.S. 594 (1994); *Idaho v. Wright*, 497 U.S. 805, 813–16 (1990); *Ohio v. Roberts*, 448 U.S. 56, 65–66 (1980); *Dutton v. Evans*, 400 U.S. 74, 88 (1970); *United States v. White*, 116 F.3d 903, 912 (D.C. Cir. 1997).

why certain statements are inherently reliable. The rationale for permitting hearsay testimony regarding statements made while receiving medical care, is that “such out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness.”<sup>174</sup> In this case, “the declarant knows that a false statement may cause misdiagnosis or mistreatment,”<sup>175</sup> and it is unlikely that an individual would tell a lie under such circumstances. Likewise, spontaneous declarations,<sup>176</sup> statements made while the declarant is excited or under stress, are considered reliable since it is assumed that the declaration was made without the opportunity to reflect or contrive.<sup>177</sup> The very circumstances under which the statement was uttered are its imprimatur of veracity. Thus, in these circumstances, further scrutiny would be superfluous and adversary testing would add little or nothing to the statement’s reliability.<sup>178</sup> Further, even those extrajudicial statements that do not come within a firmly-rooted exception, and thus, presumptively do not have indicia of reliability for purposes of the Confrontation Clause, may nonetheless meet those criteria if supported by a sufficient showing of particularized guarantees of trustworthiness.<sup>179</sup>

As shown, the right to confrontation is not absolute and may give way to other important considerations or interests.<sup>180</sup> In addition to the exceptions already noted, limitation by the trial judge and hearsay rule exceptions, the right may give way to considerations of public policy or the necessities of the case. Before such considerations are explored, however, the subject of witness intimidation, both its nature and impact, must be addressed.

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174. *White*, 502 U.S. at 355.

[S]tatements made by the victim to medical personnel for the purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule.

*Id.* at 351 n.2; *see also* CAL. EVID. CODE § 1250 (West 1995 & Supp. 2002).

175. *White*, 502 U.S. at 356.

176. California Evidence Code section 1240 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 while the declarant was under the stress of excitement caused by such perception.” CAL. EVID. CODE § 1240 (West 1995 & Supp. 2002).

177. *See White*, 502 U.S. at 356.

178. *See Idaho v. Wright*, 497 U.S. 805, 820–21 (1990).

179. *See id.* at 817.

180. *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988); *Ohio v. Roberts*, 448 U.S. 56, 64 (1980); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Mattox v. United States*, 156 U.S. 237, 243 (1895).

## IV. WITNESS INTIMIDATION

### A. *The Nature of Witness Intimidation*

#### 1. *Introduction*

Witness intimidation has a profound and serious impact on the ability of government to enforce its laws and on society's confidence in the ability of government to protect its citizens. By depriving crime investigators and prosecutors of critical evidence, witness intimidation undermines the criminal justice system's ability to protect its citizens and ultimately undermines the confidence citizens have in their government.<sup>181</sup> Courts have acknowledged "the serious nature and magnitude of the problem of witness intimidation," and that government must provide protection to its witnesses.<sup>182</sup> Because the most important factor in determining whether a case will be solved is the information supplied by the victim to the police, failure to address witness intimidation will lead to the loss of crucial evidence needed by investigators.<sup>183</sup> The California State Legislature has recognized the important and integral part that crime witnesses play in the criminal justice system:

In recognition of the civil and moral duty of victims and witnesses of crime to fully and voluntarily cooperate with law enforcement and prosecutorial agencies, and in further recognition of the continuing importance of this citizen cooperation to state and local law enforcement efforts and the general effectiveness and well-being of the criminal justice system of this state, the Legislature declares its intent, in the enactment of this title, to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity. It is the further intent that the rights enumerated in Section 679.02 relating to victims and witnesses of crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants.<sup>184</sup>

Witness intimidation may frighten eyewitnesses to a crime to the point that they will not come forward and provide crucial evidence to the police and investigators. Or, witnesses may be so terrified because of intimidation that they refuse to testify. Or, witness intimidation may result in the disappearance or elimination of a witness to prevent him or her from testifying at a defendant's trial. In each instance, the criminal justice system, society, and public safety

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181. PETER FINN & KERRY MURPHY HEALEY, U.S. DEP'T OF JUSTICE, PREVENTING GANG- AND DRUG-RELATED WITNESS INTIMIDATION 1 (1996).

182. *Alvarado v. Superior Court*, 5 P.3d 203, 222 (Cal. 2000).

183. JULIE ESSELMAN TOMZ & DANIEL MCGILLIS, U.S. DEP'T OF JUSTICE, SERVING CRIME VICTIMS AND WITNESSES 2 (2d ed. 1997).

184. CAL. PENAL CODE § 679 (West 1999).

suffer.<sup>185</sup> Each situation prevents the prosecution of crimes, allows those who are guilty of crimes to remain free and go unpunished, and frustrates law enforcement personnel and prosecutors.<sup>186</sup> Finally, instances of witness intimidation create the perception that the law cannot protect its citizens and thereby undermines public confidence in the police and government.<sup>187</sup> If individuals believe that they cannot be adequately protected, they are less likely to cooperate with the police, which in turn impedes the ability of the police to gather evidence in attempt to stop criminal behavior. Thus, the cycle is vicious and invidious.

Even though the United States Department of Justice has conducted surveys about witness intimidation, the results of which indicate that it is increasing and widespread, the Department acknowledged that the exact extent of intimidation is unknown.<sup>188</sup> Before discussing these surveys, the nature of witness intimidation, both community intimidation and direct intimidation, will be addressed.

## 2. *Community Intimidation*

Community intimidation exists in neighborhoods with criminal street gangs. Attempts by gangs or drug dealers to promote community-wide noncooperation may include the public humiliation, assault, or even execution of victims or witnesses, or members of their families, as well as public acts of extreme brutality that are meant to terrify potential witnesses. Even though there may not be an express threat of harm addressed to any particular individual, intimidation felt by the neighborhood inhabitants is just as real.<sup>189</sup> Those who live in the area know that certain identified gangs claim the area as their “turf.”<sup>190</sup> The residents have seen criminal acts and witnessed acts of retaliation sufficient for them to believe that the same sort of harm would come to them if any statements were given to law enforcement concerning any witnessed criminal activity.<sup>191</sup> Community intimidation is characterized

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185. See *People v. Weidert*, 705 P.2d 380, 394 (Cal. 1985) (Lucas, J., concurring and dissenting).

186. See *FINN & HEALEY*, *supra* note 181, at vii.

187. See *id.* at 2.

188. *Id.* at 4.

189. See *id.* at xi, 2, 5.

190. See *People v. Gardeley*, 927 P.2d 713, 718 (Cal. 1996); *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 601 (Cal. 1997).

191. See *Acuna*, 929 P.2d at 601–02, 613–14.

by an atmosphere of fear and noncooperation with the police. It is generated by a history of community members witnessing incidents of gang violence, crimes, and retaliation against cooperating witnesses.<sup>192</sup> Each instance of witness intimidation by gang violence or threat of violence reinforces the perception that cooperation with the criminal justice system is dangerous.<sup>193</sup>

Because penalties for witness tampering, suborning perjury, and obstruction of justice are slight in comparison to penalties for violent crimes such as murder, defendants accused of serious violent crimes may feel that they have little to lose and much to gain from witness intimidation.<sup>194</sup> Gang members use intimidation and violence to subdue any perceived challenge to their authority. Disputes or arguments with those outside the gang are settled through the use of violence, even murder. Others in the neighborhood are terrorized by the threat of such retaliation, and this fear allows the gangs to continue their criminal activity.<sup>195</sup> Often, the police and prosecutors must resort to relying on incarcerated witnesses or other felons for testimony in gang cases.<sup>196</sup> Even when gang members are placed behind bars, neighborhood citizens feel no relief from community intimidation. The threat of retaliation from gang members who return after serving only brief sentences or who arrange for others to get to or threaten them remains.<sup>197</sup> Because it is well-known that incarcerated gang members maintain uninterrupted communication with gang members outside of prison, the threat of retaliation against witnesses continues despite a defendant's imprisonment pending trial, or even after conviction.<sup>198</sup>

A good example of community intimidation by a gang is set forth in *People ex rel. Gallo v. Acuna*.<sup>199</sup> The community was Rocksprings in San Jose, California, and the court described the situation as follows:

The 48 declarations submitted by the City in support of its plea for injunctive relief paint a graphic portrait of life in the community of Rocksprings. Rocksprings is an urban war zone. The four-square-block neighborhood, claimed as the turf of a gang variously known as Varrio Sureño Town, Varrio Sureño Treces (VST), or Varrio Sureño Locos (VSL), is an occupied territory. Gang members, all of whom live elsewhere, congregate on lawns, on sidewalks, and in front of apartment complexes at all hours of the day and night. They display a casual contempt for notions of law, order, and decency—openly drinking, smoking dope, sniffing toluene, and even snorting

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192. See FINN & HEALEY, *supra* note 181, at 2.

193. See *id.*

194. *Id.* at 79.

195. See *Gardeley*, 927 P.2d at 718.

196. FINN & HEALEY, *supra* note 181, at 4.

197. *Id.* at 2.

198. *Id.*

199. *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997).



cocaine laid out in neat lines on the hoods of residents' cars. The people who live in Rocksprings are subjected to loud talk, loud music, vulgarity, profanity, brutality, fistfights and the sound of gunfire echoing in the streets. Gang members take over sidewalks, driveways, carports, apartment parking areas, and impede traffic on the public thoroughfares to conduct their drive-up drug bazaar. Murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson, and theft are commonplace. The community has become a staging area for gang-related violence and a dumping ground for the weapons and instrumentalities of crime once the deed is done. Area residents have had their garages used as urinals; their homes commandeered as escape routes; their walls, fences, garage doors, sidewalks, and even their vehicles turned into a sullen canvas of gang graffiti.

The people of this community are prisoners in their own homes. Violence and the threat of violence are constant. Residents remain indoors, especially at night. They do not allow their children to play outside. Strangers wearing the wrong color clothing are at risk. Relatives and friends refuse to visit. The laundry rooms, the trash dumpsters, the residents' vehicles, and their parking spaces are used to deal and stash drugs. Verbal harassment, physical intimidation, threats of retaliation, and retaliation are the likely fate of anyone who complains of the gang's illegal activities or tells police where drugs may be hidden.<sup>200</sup>

Recognition of this dire situation is also reflected in the enactment of a California statute called the "STEP Act," a euphemism for the California Street Terrorism Enforcement and Prevention Act, passed in 1988.<sup>201</sup> The preamble provides:

The Legislature, however, further finds that the State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected. The Legislature finds that there are nearly 600 criminal street gangs operating in California, and that the number of gang-related murders is increasing. The Legislature also finds that in Los Angeles County alone there were 328 gang-related murders in 1986, and that gang homicides in 1987 have increased 80 percent over 1986. It is the intent of the Legislature in enacting this chapter to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs. The Legislature further finds that an effective means of punishing and deterring the criminal activities of street gangs is through forfeiture of the profits, proceeds, and instrumentalities acquired, accumulated, or used by street gangs.<sup>202</sup>

The sad fact is that a community's perception that the criminal justice system cannot protect its citizens destroys the ability of police and

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200. *Id.* at 601-02.

201. CAL. PENAL CODE §§ 186.20-186.28 (West 1999 & Supp. 2002).

202. CAL. PENAL CODE § 186.21 (West 1999 & Supp. 2002).

prosecutors to do their job as effectively as any specific threat.<sup>203</sup>

### 3. *Direct Intimidation*

In addition to community intimidation, the criminal defendant may directly intimidate a witness. Direct intimidation involves a threat communicated in some manner to a witness, or an actual physical assault on the witness. The threat is communicated either by the defendant, or those close to him, either at his direction or with his consent, and is intended to cause the witness not to testify or to change his or her testimony to benefit the defendant. Any physical assault is intended to have the same effect on the witness.<sup>204</sup>

Such intimidation can take many forms, such as physical violence or threats of physical violence against the witness or a member of the witness's family.<sup>205</sup> Particularly effective are threats of physical violence against a witness's mother, children, or spouse. Threats may be communicated by drive-by shootings into the witness's home, fire bombings of cars, house burnings, or any other form of violent activity. Intimidation may also involve explicit threats of murder.<sup>206</sup>

In 1994, then-assistant U.S. district attorney for the District of Columbia expressed what he believed to be the reasons for the increase in witness intimidation:

In my view the reasons for this dramatic increase in fear and intimidation are many and varied. The defendants we prosecute for committing violent crime are not only much younger than in the past, but they very often display several commonly held attitudes and beliefs, including a profound lack of respect for authority[;] the expectation that their own lives will be brief or will be lived out in prison[;] a sense of powerlessness and social inadequacy that can lead to the formation of gangs or neighborhood crews[;] the ready availability of very powerful firearms[;] a willingness to use those firearms for almost no reason or in retaliation for the most minimal slight to their extraordinarily fragile egos[;] and lastly, and ironically, the increased penalties being imposed on those convicted of violent crime, which can raise the stakes of a prosecution.<sup>207</sup>

Intimidation may occur inside the courtroom or outside the courthouse.<sup>208</sup> It may involve the defendant, his relatives, or his associates. Inside the courtroom, for example, the defendant's friends or relatives may stare or gesture at a witness in a threatening manner

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203. FINN & HEALEY, *supra* note 181, at 2.

204. *See id.* at 1–10; NEXT MILLENIUM, *supra* note 15, at 1 (stating that “[w]itnesses are being intimidated and threatened by gang members to keep them from testifying”).

205. FINN & HEALEY, *supra* note 181, at 5–7.

206. *See id.* at 1–2.

207. *Id.* at 6.

208. *See, e.g.,* People v. Lybrand, 171 Cal. Rptr. 157, 162 (Ct. App. 1981).

while the witness is in the courthouse or courtroom. Another particularly effective form of intimidation occurs when gang members pack the courtroom to demonstrate their solidarity with the defendant. These gang members often wear black to symbolize death, stare at the witness intently, or use threatening hand signals.<sup>209</sup> Defendants also manipulate the penal system to procure the intimidation of witnesses. Defendants have access to information obtained by their defense attorneys from prosecutors during discovery. In some jurisdictions where prisoners have unmonitored phone use and unscreened correspondence, defendants can use this information to arrange witness intimidation by those outside of prison. Some gangs have even hired defense attorneys for witnesses in custody for related or unrelated crimes without the witnesses' knowledge or consent in an effort to control their testimony.<sup>210</sup> Other examples of intimidation in courtroom settings have been memorialized in published cases.

In one case, as the witness stepped down from the stand after testifying, the defendant made a throat slitting gesture directed at the witness. The witness burst out, "What the hell did that mean? He's over there going like this—excuse me, your Honor." The trial judge permitted the witness to retake the witness stand and testify and describe to the jury what had occurred. On appeal, the court found that the trial judge did not err, because the evidence was admissible and relevant as to the defendant's consciousness of guilt.<sup>211</sup>

An infamous case of courtroom intimidation involved Charles Manson and his followers, Patricia Krenwinkel and Susan Atkins.<sup>212</sup> Linda Kasabian, another devotee of Manson's, had been charged as well, but was granted immunity and testified as a witness for the prosecution.<sup>213</sup> As she testified, Manson stared at her, and "took his right index finger from right to left and made a motion across the bottom [of] his chin from right to left,"<sup>214</sup> simulating the slitting of a throat.<sup>215</sup>

Courtroom intimidation may also involve friends or relatives of the defendant. The victim in a sex case had been warned by the defendant

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209. FINN & HEALEY, *supra* note 181, at 7.

210. *Id.*

211. *People v. Foster*, 246 Cal. Rptr. 855, 857 (Ct. App. 1988).

212. *See People v. Manson*, 132 Cal. Rptr. 265, 276–77 (Ct. App. 1976).

213. *Id.* at 281.

214. *Id.* at 296 (alteration in original) (quoting Sergeant Gutierrez of the Los Angeles Police Department, who observed Manson's threatening behavior at the trial).

215. *Id.* at 296 n.40.

that she should never tell the police what happened because “he had a lot of bad friends.”<sup>216</sup> As she was about to leave the courthouse after the preliminary hearing, she saw three men who had been in the courtroom at the time of her testimony leaning against the hood of her parked car. One man was the defendant’s father and one was his brother. She had also received threatening telephone calls from a man who identified himself as a friend of the defendant warning her not to testify.<sup>217</sup>

In another case, three different witnesses gave statements to the police and identified the defendant, who was on trial for murder, as the individual who shot the victim. By the time of the trial, however, all three witnesses were reluctant to testify.<sup>218</sup> Each of the witnesses either recanted their prior statements to the police, claimed loss of memory, or claimed that their earlier statements were tainted either by use of drugs, alcohol, or for some other reason. Each had been threatened by the defendant’s brother prior to trial.<sup>219</sup>

In yet another case, a witness was reluctant to testify and hid his face while he testified. He was afraid because the defendant’s aunt had followed him from the courtroom on one occasion, and the witness’s brother, who was in custody, was assaulted by the defendant when they were both in jail two days after the witness’s earlier testimony.<sup>220</sup>

Witness intimidation is often the reason why a witness’s testimony at trial is contrary or contradictory to that witness’s earlier statements to the police.<sup>221</sup> Three teenage witnesses in one case testified at the defendant’s preliminary hearing. During each of the three witnesses’ testimony, the defendant’s brother sat in the courtroom and glared at the witness.<sup>222</sup> At the time of jury trial, all three witnesses recanted their earlier testimony, and denied each piece of information and each statement they had given to the police.<sup>223</sup> Even though all of the witnesses denied being threatened, the trial court noted that their demeanor during their testimony evidenced otherwise.<sup>224</sup>

Witness intimidation and murder have also led federal trial courts to impanel anonymous jurors. Vittorio Amuso, the reputed head of the Luchese crime family, was tried in 1992 for fourteen murders, tax fraud, and other crimes.<sup>225</sup> Before trial, the prosecution presented evidence that

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216. *People v. Lybrand*, 171 Cal. Rptr. 157, 162 (Ct. App. 1981).

217. *Id.*

218. *See People v. Gutierrez*, 28 Cal. Rptr. 2d 897, 903 (Ct. App. 1994).

219. *Id.* at 903–04.

220. *People v. Feagin*, 40 Cal. Rptr. 2d 918, 921 (Ct. App. 1995).

221. *See People v. Armijo*, 270 Cal. Rptr. 496, 498 & n.1, 499–502 (Ct. App. 1990).

222. *Id.* at 502.

223. *Id.* at 497–99.

224. *See id.* at 498 & n.1, 499, 501–02.

225. *United States v. Amuso*, 21 F.3d 1251, 1254 (2d Cir. 1994).

Amuso had made prior attempts to interfere with witnesses and that Amuso, being the head of a powerful and violent crime organization, “had the means to engage in jury tampering.”<sup>226</sup> The trial court granted the prosecutor’s request for an anonymous and sequestered jury.<sup>227</sup> Evidence during the trial showed that Amuso had the exclusive and ultimate authority to order murders on behalf of the crime family. Two former captains of the Luchese family turned government witnesses and testified for the prosecution during the trial.<sup>228</sup> They testified about fourteen murders committed over a two-year period, which were ordered by the defendant to eradicate disloyalty within the family. Contracts were ordered against the two government witnesses prior to their testimony, and one was shot twelve times, but survived and testified.<sup>229</sup> The defendant was ultimately convicted of fifty-four counts of racketeering, extortion, fraud, bribery, and multiple murders.<sup>230</sup>

In another case involving organized crime, the defendant, Nicodemo Scarfo, was the boss of the Philadelphia La Cosa Nostra.<sup>231</sup> The defendant had conspired with a councilman and his administrative aide to extort \$1,000,000 from a real estate developer in exchange for the councilman’s cooperation in the redevelopment project on the waterfront. The real estate developer contacted the FBI and reported the extortion plan. Unbeknownst to the crime family, the FBI had already infiltrated the organization. The case went to trial based on evidence obtained from the FBI and from two members of Scarfo’s organization, who agreed to testify as government witnesses. This permitted the government to present virtually conclusive proof of the extortion scheme. However, before trial, one prospective witness and one judge were murdered, and attempts had been made to bribe other judges. The two government witnesses, one a former “capo” in the defendant’s group, testified to these facts. Both government witnesses were threatened and relocated after trial.<sup>232</sup>

In another case, defendants, members of an infamous Asian gang known as “Born to Kill,”<sup>233</sup> were charged with multiple counts,

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226. *Id.* at 1264.

227. *Id.*

228. *Id.* at 1254.

229. *Id.* at 1254, 1257.

230. *Id.* at 1253.

231. *United States v. Scarfo*, 850 F.2d 1015, 1017 (3d Cir. 1988).

232. *Id.* at 1017–20.

233. *United States v. Thai*, 29 F.3d 785, 794–95 (2d Cir. 1994).

including murder, robbery, and extortion.<sup>234</sup> One robbery victim identified several of the gang members at a line-up as the ones who robbed his jewelry store. After several attempts of intimidating the witness to keep him from testifying against them at trial, they murdered him with a close-up gunshot to his head.<sup>235</sup> In other Born to Kill robberies, the robbers pointed and cocked their guns at the victims just prior to leaving.<sup>236</sup>

Another Asian gang that specialized in extortion was the Green Dragon Gang.<sup>237</sup> Members of the gang committed robberies and extorted “protection money” from Chinese-run businesses. To protect their enterprise, the gang members often engaged in violence, murdering witnesses who identified them and victims who refused to pay the extortion money.<sup>238</sup> In support of a motion to impanel an anonymous jury, the prosecution presented evidence of the gang’s extensive history of interfering with the judicial process, including the murders of witnesses in retaliation for testifying and attempted murders of witnesses to prevent them from testifying. The trial court granted the motion for an anonymous jury.<sup>239</sup>

In yet another case, seven members of the Mexican Mafia (EME) were charged with a continuing enterprise of murder, drug distribution and firearm offenses. The gang had a written constitution, which included in the preamble the following statement: “Being a criminal organization . . . [w]e shall deal in drugs, contract killings, prostitution, large scale robbery [etc.]”<sup>240</sup> One of the group’s tenets was to interfere with potential witnesses and to murder or attempt to murder members suspected of becoming informants.<sup>241</sup>

Intimidation also occurs inside prison walls where incarcerated inmates are particularly vulnerable. Because their movements are restricted, inmates are easy prey to other inmates.<sup>242</sup> Prison inmate murders among notorious prison gangs are not unusual. Taking out a prospective witness may be part of a gang initiation because some gangs, like the Aryan Brotherhood and the Mexican Mafia, require that prospective members kill as a condition of association.<sup>243</sup> Prison gang

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234. *See id.* at 794.

235. *See id.* at 798.

236. *Id.* at 796.

237. *United States v. Wong*, 40 F.3d 1347, 1355 (2d Cir. 1994).

238. *Id.* at 1355, 1374, 1377, 1379–80.

239. *See id.* at 1376–77.

240. *United States v. Krout*, 66 F.3d 1420, 1424 & n.1 (5th Cir. 1995) (alterations in original).

241. *Id.* at 1428.

242. FINN & HEALEY, *supra* note 181, at 8.

243. *See United States v. Silverstein*, 732 F.2d 1338, 1341 (7th Cir. 1984); *United*

members are even able to plan and direct the murders of individuals housed in separate penitentiaries.<sup>244</sup>

One prison case involved an inmate murder contracted by the Aryan Brotherhood, a violent white supremacist prison gang.<sup>245</sup> The case describes how a contract was taken out on the victim because he had cheated an Aryan Brotherhood commissioner in another penitentiary. The cheated Aryan member successfully communicated the contract to a member of the Brotherhood incarcerated in a different federal prison, despite mail censorship and restrictions on inter-inmate correspondence.<sup>246</sup> One government witness was so frightened that he slashed his wrists and hanged himself in a phony suicide attempt, in order to be placed in the Witness Protection Program.<sup>247</sup>

### *B. Witness Intimidation Statistics*

Statistics reflect an increase in victim and witness intimidation. For example, a 1990 study conducted in New York City showed that 36% of victims and witnesses in criminal cases at the Bronx Criminal Court had been threatened, and 57% who had not been threatened nevertheless feared retaliation.<sup>248</sup>

In 1994, the United States Department of Justice conducted a survey of 2350 state prosecutorial agencies that handle felony cases and staff at least 65,000 individuals. Those individuals included attorneys, investigators, and support staff.<sup>249</sup> Of the total number of offices surveyed, 75% provided either security or assistance for victims or witnesses in criminal cases who had been threatened.<sup>250</sup> Approximately half of the offices reported that a staff member received a threat or was in fact assaulted.<sup>251</sup> In fact, from 1992 to 1994, threats or assaults

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States v. Santiago, 46 F.3d 885, 888 (9th Cir. 1995).

244. See *Silverstein*, 732 F.2d at 1341–43. Two of the inmates involved in the murder in *Silverstein* were also involved in other prison murders. See *id.* at 1342–43; see also *United States v. Mills*, 704 F.2d 1553, 1555 (11th Cir. 1983); *United States v. Fountain*, 642 F.2d 1083, 1085–86 (7th Cir. 1982).

245. See *Mills*, 704 F.2d at 1555.

246. *Id.*

247. *Id.* at 1560.

248. Healey, *supra* note 11, at 13 n.3.

249. CAROL J. DEFRANCES ET AL., U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 1994, at 1 (1996).

250. *Id.*

251. *Id.*

against staff members increased from 28% to 51%.<sup>252</sup> In 74% of the offices, prosecutors failed to pursue a felony case to trial because of victims' fears of retaliation.<sup>253</sup> Eighty-two percent of the larger prosecutorial offices reported case dismissals because of the unavailability of prosecution witnesses. Reluctance to testify, either because of fear of retribution or because of actual threats to victims, occurred in 92% of these offices, and to witnesses in 77% of the offices.<sup>254</sup> In over half of the offices, a staff member was the victim of either a threat or an assault. This indicated a 100% increase from two years earlier.<sup>255</sup> Different types of security were employed to protect those threatened, including personal police protection, transportation under guard to and from court, or actual relocation of the threatened individual.<sup>256</sup>

Another 1994 survey sampled 192 prosecutors and found that 51% of prosecutors in large jurisdictions, counties with populations greater than 250,000, considered victim and witness intimidation a major problem. This same survey found that in small jurisdictions, counties with populations between 50,000 and 250,000, 43% of the prosecutors stated that victim and witness intimidation was a major problem. Another 30% of large jurisdictions and 25% of small jurisdictions considered intimidation a moderately serious problem.<sup>257</sup>

In 1995, the Department of Justice reported that victim and witness intimidation had been increasing over the past two decades. Prosecutors estimated intimidation in 75% to 100% of cases that involved violent crimes in gang areas.<sup>258</sup>

Neither those in charge of the Federal Witness Protection Program or the California program keep statistics on the number of individuals who leave the program and are threatened or assaulted. Nor are any statistics kept on the number of individuals that leave the program and are eventually killed.<sup>259</sup>

### C. *Witness Protection Programs*

#### 1. *The Federal Program*

In the late 1960s, the United States Department of Justice recognized

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252. *Id.* at 2.

253. *See id.* at 5.

254. *Id.* at 5 & tbl.6.

255. *See id.* at 5.

256. *Id.* at 6, 9.

257. FINN & HEALEY, *supra* note 181, at 5.

258. Healey, *supra* note 11, at 1–2.

259. *See infra* notes 278–80 and accompanying text.



that victim and witness intimidation had become a serious impediment to obtaining testimony in organized crime cases.<sup>260</sup> This concern was also fueled by statistics that revealed that a staggering number of crimes were never reported.<sup>261</sup> In response, Congress enacted the Organized Crime Control Act of 1970, which laid the basis for the Federal Witness Protection Program.<sup>262</sup>

The Federal Witness Protection Program<sup>263</sup> was authorized by the Organized Crime Control Act of 1970.<sup>264</sup> Originally, the program was formulated to purchase and maintain housing facilities for protected witnesses, but that approach was discarded.<sup>265</sup> The legislative intent was

260. Healey, *supra* note 11, at 6.

261. TOMZ & MCGILLIS, *supra* note 183, at 2.

262. Healey, *supra* note 11, at 6.

263. 18 U.S.C. §§ 3521–3528 (2000).

264. Organized Crime Control Act of 1970, Pub. L. No. 91-452, §§ 501–504, 84 Stat. 922, 933–34 (1970). Title V authorizes the United States Attorney General to protect and maintain federal or state organized crime witnesses and their families. Sections 501 through 504 provide:

Sec. 501. The Attorney General of the United States is authorized to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity.

Sec. 502. The Attorney General of the United States is authorized to rent, purchase, modify, or remodel protected housing facilities and to otherwise offer to provide for the health, safety, and welfare of witnesses and persons intended to be called as Government witnesses, and the families of witnesses and persons intended to be called as Government witnesses in legal proceedings instituted against any person alleged to have participated in an organized criminal activity whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy. Any person availing himself of an offer by the Attorney General to use such facilities may continue to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues.

Sec. 503. As used in this title, “Government” means the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof. The offer of facilities to witnesses may be conditioned by the Attorney General upon reimbursement in whole or in part to the United States by any State or any political subdivision, or any department, agency, or instrumentality thereof of the cost of maintaining and protecting such witnesses.

Sec. 504. There is hereby authorized to be appropriated from time to time such funds as are necessary to carry out the provisions of this title.

*Id.*

265. Franz v. United States, 707 F.2d 582, 586–87 (D.C. Cir. 1983).

twofold: to create an incentive for persons involved in organized crime to become informants<sup>266</sup> and to recognize “a felt moral obligation to repay citizens who risk life by carrying out their duty as citizens to testify.”<sup>267</sup> Again, as originally formulated, services were to be limited to witnesses of organized crime,<sup>268</sup> but in its current form, the program provides protective services to witnesses and family members in cases involving organized crime “or other serious offense, if the Attorney General determines that an offense involving a crime of violence directed at the witness . . . is likely to be committed.”<sup>269</sup> Those services may be provided as long as the danger to the protected individual continues.<sup>270</sup> The services provided to the protected individuals may include physical protection, documents for a new identity, housing, transportation, subsistence for living, assistance in obtaining employment, and other services needed to make the individual self-sustaining.<sup>271</sup> In return, the identity and location of the individual will not be disclosed, unless law enforcement officials indicate the individual is under a criminal felony investigation.<sup>272</sup> Knowing, unauthorized disclosure subjects a person to a fine of \$5000 and/or imprisonment for five years.<sup>273</sup>

Prior to admission into the program, an evaluation of the individual’s suitability must be performed and the individual also must undergo a psychological examination.<sup>274</sup> In addition, the individual must execute a memorandum of understanding that outlines his duties, obligations and responsibilities—to testify in and provide information to law enforcement concerning the criminal proceedings, to refrain from committing any crime, to avoid detection and to cooperate with all reasonable requests of those protecting the person.<sup>275</sup> The Attorney General may terminate protection if the protected person “substantially breaches” the memorandum of understanding, or provides false information.<sup>276</sup> Physical protection for those who enter the program is provided by the United States Marshal’s office.<sup>277</sup>

In November 1996, the House of Representatives held hearings on the

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266. *Id.* at 586.

267. *Garcia v. United States*, 666 F.2d 960, 963 (5th Cir. 1982).

268. *See* Organized Crime Control Act § 501.

269. 18 U.S.C. § 3521(a)(1) (2000).

270. 18 U.S.C. § 3521(b)(1).

271. 18 U.S.C. § 3521(b)(1)(A)–(F).

272. *See* 18 U.S.C. § 3521(b)(1)(G).

273. 18 U.S.C. § 3521(b)(3).

274. 18 U.S.C. § 3521(c).

275. 18 U.S.C. § 3521(d)(1)(A)–(E).

276. 18 U.S.C. § 3521(f).

277. United States Marshals Service, 28 C.F.R. § 0.111 (2001).

Federal Witness Protection Program.<sup>278</sup> From its inception in 1970 to the date of the hearings, the program had provided protection and assistance for more than 6600 witnesses and 8000 of their family members. There is a rigorous review process for applicants, and all adults who enter the program have psychological examinations.<sup>279</sup> No one that has followed the rules and guidelines has been killed. However, there have been some who have not abided by the program's conditions and have lost their lives.<sup>280</sup> No statistics are kept on the number of such occurrences. Nor are statistics kept on the number of criminal cases which were not prosecuted because witnesses refused to testify or provide evidence due to intimidation.

One protected witness who violated the rules by giving interviews to the press, revealing his new identity, and allowing himself to be photographed was discharged from the program and unsuccessfully sued claiming a violation of his constitutional rights.<sup>281</sup> Another ultimately unsuccessful claim against the government was for negligence when a person protected by the program committed a murder.<sup>282</sup> In another case, a creditor claimed that the government committed an unconstitutional taking of his property when he was unable to locate a debtor protected by the program. The creditor's claim was also unsuccessful.<sup>283</sup>

A series of lawsuits against the government involved the relocation of children with their protected parent, without notification to the noncustodial parent.<sup>284</sup> In each of the cases, the affected parent lost all contact with his or her children and could not find out their new identities or new locations.<sup>285</sup> One parent lost contact with his children

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278. See *Witness Protection Programs in America, Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong. (1996).

279. *Id.* at 39–40 (statement of Stephen J. T'Kach, Associate Director, Office of Enforcement Operations, Criminal Division, United States Department of Justice).

280. *Id.* at 40.

281. *Garcia v. United States*, 666 F.2d 960, 961–62 (5th Cir. 1982).

282. See *Bergmann v. United States*, 689 F.2d 789, 790, 797 (8th Cir. 1982).

283. *Melo-Tone Vending, Inc. v. United States*, 666 F.2d 687, 687, 689 (1st Cir. 1981).

284. See, e.g., *Prisco v. United States*, 851 F.2d 93 (3d Cir. 1988); *Franz v. United States*, 707 F.2d 582 (D.C. Cir. 1983); *Ruffalo v. Civiletti*, 702 F.2d 710 (8th Cir. 1983); *Leonhard v. United States*, 633 F.2d 599 (2d Cir. 1980); *Leonhard v. Mitchell*, 473 F.2d 709 (2d Cir. 1973).

285. *Leonhard*, 473 F.2d at 711; *Leonhard*, 633 F.2d at 604–05; *Ruffalo*, 702 F.2d at 712–13; *Prisco*, 851 F.2d at 94; *Franz*, 707 F.2d at 589–90.

for eight years.<sup>286</sup> Each parent eventually had to file a lawsuit in order to obtain relief. After the United States Supreme Court decided in *Santosky v. Kramer* that natural parents are entitled to due process before their rights in their children may be dissolved,<sup>287</sup> courts have held that noncustodial parents have a right to notice of and a hearing on the relocation of their children as part of the Witness Protection Program.<sup>288</sup> This right is based on the fundamental liberty interest parents have in the care and management of their children's lives.<sup>289</sup> This principle is now codified as 18 U.S.C. § 3524, which requires compliance with child custody orders and notification to the affected parent.<sup>290</sup>

Despite the success of the federal Witness Protection Program, “[t]he strict requirements for entry to the . . . program, the high cost of providing lifelong services to witnesses and their families, and the personal sacrifices involved in participating in the program have led a number of prosecutors and police to seek [other alternatives].”<sup>291</sup>

## 2. *The California Witness Protection Program*

In 1997, the State of California enacted its witness protection program,<sup>292</sup> administered by the attorney general. It provides for the

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286. See *Leonhard*, 633 F.2d at 606.

287. *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982).

288. See, e.g., *Franz*, 707 F.2d at 596, 608; *Prisco*, 851 F.2d at 97.

289. See *Prisco*, 851 F.2d at 97.

290. 18 U.S.C. § 3524(a)–(c) (2000).

291. Healey, *supra* note 11, at 5.

292. California Penal Code sections 14020 through 14033 provide:

### **§ 14020. Witness Protection Program**

There is hereby established the Witness Protection Program.

### **§ 14021. Definitions**

As used in this title:

(a) “Witness” means any person who has been summoned, or is reasonably expected to be summoned, to testify in a criminal matter, including grand jury proceedings, for the people whether or not formal legal proceedings have been filed. Active or passive participation in the criminal matter does not disqualify an individual from being a witness. “Witness” may also apply to family, friends, or associates of the witness who are deemed by the Attorney General to be endangered.

(b) “Credible evidence” means evidence leading a reasonable person to believe that substantial reliability should be attached to the evidence.

(c) “Protection” means formal admission into a witness protection program established by this title memorialized by a written agreement between the Attorney General and the witness.

### **§ 14022. Administration of program; Attorney General**

The program shall be administered by the Attorney General. In any

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criminal proceeding within this state, when the action is brought by local prosecutors, where credible evidence exists of a substantial danger that a witness may suffer intimidation or retaliatory violence, the Attorney General may reimburse state and local agencies for the costs of providing witness protection services.

**§ 14023. Prioritization**

The Attorney General shall give priority to matters involving organized crime, gang activities, drug trafficking, and cases involving a high degree of risk to the witness. Special regard shall also be given to the elderly, the young, battered, victims of domestic violence, the infirm, the handicapped, and victims of hate incidents.

**§ 14024. Coordination of efforts between state and local agencies; reimbursements**

The Attorney General shall coordinate the efforts of state and local agencies to secure witness protection services and then reimburse those state and local agencies for the costs of the services that he or she determines to be necessary to protect a witness from bodily injury and otherwise to assure the health, safety, and welfare of the witness. The Attorney General may reimburse the state or local agencies that provide witnesses with any of the following:

- (a) Armed protection or escort by law enforcement officials or security personnel before, during, or subsequent to, legal proceedings.
- (b) Physical relocation to an alternate residence.
- (c) Housing expense.
- (d) Appropriate documents to establish a new identity.
- (e) Transportation or storage of personal possessions.
- (f) Basic living expenses, including, but not limited to, food, transportation, utility costs, and health care.
- (g) Other services as needed and approved by the Attorney General.

**§ 14025. Witness protection agreement; terms**

The witness protection agreement shall be in writing, and shall specify the responsibilities of the protected person that establish the conditions for the Attorney General providing protection. The protected person shall agree to all of the following:

- (a) If a witness or potential witness, to testify in and provide information to all appropriate law enforcement officials concerning all appropriate proceedings.
- (b) To refrain from committing any crime.
- (c) To take all necessary steps to avoid detection by others of the facts concerning the protection provided to that person under this title.
- (d) To comply with legal obligations and civil judgments against that person.
- (e) To cooperate with all reasonable requests of officers and employees of this state who are providing protection under this title.
- (f) To designate another person to act as agent for the service of process.

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(g) To make a sworn statement of all outstanding legal obligations, including obligations concerning child custody and visitation.

(h) To disclose any probation or parole responsibilities, and if the person is on probation or parole.

(i) To regularly inform the appropriate program official of his or her activities and current address.

**§ 14025.5. Liability of Attorney General**

The Attorney General shall not be liable for any condition in the witness protection agreement that cannot reasonably be met due to a witness committing a crime during participation in the program.

**§ 14026. Funding; uses**

Funds available to implement this title may be used for any of the following:

(a) To protect witnesses where credible evidence exists that they may be in substantial danger of intimidation or retaliatory violence because of their testimony.

(b) To provide temporary and permanent relocation of witnesses and provide for their transition and well-being into a safe and secure environment.

(c) To pay the costs of administering the program.

**§ 14026.5. Witness deemed victim**

For the purposes of this title, notwithstanding Article 1 (commencing with Section 13959) of Chapter 5 of Part 4 of Division 3 of Title 2 of the Government Code, a witness, as defined in subdivision (a) of Section 14021, selected by the Attorney General to receive services under the program established pursuant to this title because he or she has been or may be victimized due to the testimony he or she will give, shall be deemed a victim.

**§ 14027. Guidelines and regulations**

The Attorney General shall issue appropriate guidelines and may adopt regulations to implement this title. These guidelines shall include:

(a) A process whereby state and local agencies shall apply for reimbursement of the costs of providing witness protection services.

(b) An appropriate level for the match that shall be made by local agencies. The Attorney General may also establish a process through which to waive the required local match when appropriate.

**§ 14028. Immunity from civil liability**

The State of California, the counties and cities within the state, and their respective officers and employees shall have immunity from civil liability for any decision declining or revoking protection to a witness under this title.

**§ 14029. Confidentiality of witness information**

All information relating to any witness participating in the program established pursuant to this title shall remain confidential and is not subject to disclosure pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) and, if a change of name has been approved by the program, the order to show cause is not subject to the publication requirement of Section 1277 of the Code of Civil Procedure.

**§ 14030. Legal process; liaison with United States Marshal**

(a) The Attorney General shall establish a liaison with the United States

protection and relocation of witnesses “where credible evidence exists that they may be in substantial danger of intimidation or retaliatory violence because of their testimony.”<sup>293</sup> The reason for the enactment was the legislature’s recognition that retaliation against witnesses has a serious negative impact on the prosecution of crime.<sup>294</sup> At one of the Assembly Committee’s hearings, it was noted that

[a]ccording to a recent Los Angeles Times series, more than a thousand gang killers are walking the streets of Los Angeles. More and more gang killers responsible for about 40% of Los Angeles County’s murders remain free. Witness intimidation helps keep them on the street. Witnesses have been killed and many more threatened. Incidents of witness intimidation occur frequently

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Marshal’s office in order to facilitate the legal processes over which the federal government has sole authority, including, but not limited to, those processes included in Section 14024. The liaison shall coordinate all requests for federal assistance relating to witness protection as established by this title.

(b) The Attorney General shall pursue all federal sources that may be available for implementing this program. For that purpose, the Attorney General shall establish a liaison with the United States Department of Justice.

(c) The Attorney General with the Board of Control shall establish procedures to maximize federal funds for witness protection services.

**§ 14031. Annual reports**

Commencing one year after the effective date of this title, the Attorney General shall make an annual report to the Legislature no later than January 1 on the fiscal and operational status of the program.

**§ 14032. Administrative costs**

The administrative costs of the Attorney General for the purposes of administering this title shall be limited to 5 percent of all costs incurred pursuant to this title.

**§ 14033. Budget; appropriations**

(a) The Governor’s budget shall specify the estimated amount in the Restitution Fund that is in excess of the amount needed to pay claims pursuant to Sections 13960 to 13965, inclusive, of the Government Code, to pay administrative costs for increasing restitution funds, and to maintain a prudent reserve.

(b) It is the intent of the Legislature that, notwithstanding Government Code Section 13967, in the annual Budget Act, funds be appropriated to the Attorney General from those funds that are in excess of the amount specified pursuant to subdivision (a) for the purposes of this title.

CAL. PENAL CODE §§ 14020–14033 (West 2000 & Supp. 2002).

293. *Id.* § 14026(a).

294. *Assembly Comm. Report on AB 856*, 1997–98 Reg. Sess., at 3 (Cal. Apr. 22, 1997), available at [http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab\\_0851-0900/ab\\_856\\_cfa\\_19970421\\_073716\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_0851-0900/ab_856_cfa_19970421_073716_asm_comm.html) (last visited Nov. 15, 2002).

enough to frighten potential witnesses from cooperating with prosecutors. Gang cases are the hardest to solve.<sup>295</sup>

The assembly concluded that

[t]here is a compelling need for a statewide [witness protection program]. The problems posed by witness intimidation in gang cases cannot be overstated. Even in cases where there has been no direct intimidation, there is often a need for relocation to secure the cooperation of witnesses who for good reason fear that they and their families are at risk if they cooperate with law enforcement.<sup>296</sup>

One of the articles in the series referenced by the assembly stated that “[t]he witness protection problem is particularly severe in Los Angeles County, where authorities say witness intimidation and killings have helped fuel a cycle of violence in which more and more people are too frightened to testify, allowing more killers to go free.”<sup>297</sup> More recent articles have recounted the ability of imprisoned defendants to arrange contract killings. According to one article, because of the large volume of telephone calls made by inmates, only a small percentage of them are monitored. Some facilities, such as county jails, do not monitor calls at all.<sup>298</sup> Several news articles have featured stories about crime victims who have been attacked, or antigang activists who have been killed.<sup>299</sup> The California Department of Justice, through the Law Enforcement Information Center, recorded 2966 felony and misdemeanor arrests for witness intimidation from 1992 through 1997,<sup>300</sup> and from 1995 to 1996, thirty-eight persons were incarcerated for witness intimidation.<sup>301</sup>

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295. *Id.* at 1.

296. *Id.* at 5.

297. Ted Rohrlich & Fredric N. Tulsy, *Efforts to Protect Witnesses Fall Short in L.A. County*, L.A. TIMES, Dec. 23, 1996, at A1. Several other articles contain information on witness intimidation. *Accused Rapist Shoots Witness, Kills Himself*, L.A. TIMES, Oct. 21, 2000, at A21; Michael Krikorian, *Case of Teacher's Shooting Dropped After 2 Trials*, L.A. TIMES, Jan. 28, 1997, at B3; Gina Piccalo & Kurt Streeter, *Venice Anti-Gang Activist Killed in His Driveway*, L.A. TIMES, Oct. 19, 2000, at B1; George Ramos, *Witness Tells of His Life in Prison Gang*, L.A. TIMES, Jan. 30, 1997, at B1; Daniel Yi, *Inmates Do More than Phone Home*, L.A. TIMES, Apr. 25, 2001, at A1; see also *Alvarado v. Superior Court*, 5 P.3d 203, 222 n.14 (Cal. 2000) (listing articles).

298. Yi, *supra* note 297 (noting that with the First Amendment as a shield and monitoring spotty, prisoners make calls to arrange crimes that include murder).

299. *Gunman Shoots 2, Kills Self in Court Hall*, ORANGE COUNTY REG., Oct. 21, 2000, at News 4; Piccalo & Streeter, *supra* note 297; *Prisoner Moved to Cut Alleged Mob Ties*, PRESS-TELEGRAM, Jan. 9, 2001, at A3.

300. *Assembly Comm. Report on AB 856*, 1997–98 Reg. Sess., at 2 (Cal. Apr. 22, 1997), available at [http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab\\_0851-0900/ab\\_856\\_cfa\\_19970421\\_073716\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_0851-0900/ab_856_cfa_19970421_073716_asm_comm.html) (last visited Nov. 15, 2002).

301. *Assembly Comm. Report on AB 856*, 1997–98 Reg. Sess., at 2 (Cal. May 21, 1997), available at [http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab\\_0851-0900/ab\\_856\\_cfa\\_19970421\\_073716\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_0851-0900/ab_856_cfa_19970421_073716_asm_comm.html) (last visited Nov. 15, 2002); see CAL. PENAL CODE § 190.2(a)(10) (West 2002) (prescribing either the death penalty or life



According to the Los Angeles County District Attorney, from 1995 to 2000, twenty-five cases were filed that alleged the special circumstance of murdering a witness to a crime to prevent that person from testifying or in retaliation for testifying. Moreover, during that period, the Los Angeles County District Attorney reported that 1600 cases of witness intimidation were being investigated and that in over 1000 gang murder cases, witnesses refused to cooperate.<sup>302</sup>

The California witness protection program authorizes the attorney general to administer the program and to reimburse state and local agencies for the costs of providing witness protection services.<sup>303</sup> Unlike the federal program, which has its own enforcement agency, the state must rely on local enforcement departments to provide whatever services they decide are appropriate and necessary.<sup>304</sup> Those services include armed protection and armed escort before, during, and after legal proceedings; physical relocation; housing expenses; a new identity; transportation; subsistence allowance; and other services as needed.<sup>305</sup> The protection is limited to a period of six months. If additional protection is warranted, however, an extension may be granted.<sup>306</sup> Again, this differs from the federal program, which has no time limitation for its services. Furthermore, the period of protection is relatively short, because the majority of murder cases last one year or more from the time of commission of the crime until a verdict is rendered.

Like the federal program, the witnesses protected under the California program must enter into a written agreement that specifies the responsibilities of the protected person, including the obligation to testify and provide information concerning the subject proceedings, to take steps to avoid detection, to cooperate with reasonable requests, and to continually inform program officials of his or her activities and current address.<sup>307</sup> Priority for acceptance into the program is given to

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imprisonment as punishment for killing a witness in order to prevent that witness from testifying in a criminal proceeding).

302. See *Alvarado v. Superior Court*, 5 P.3d 203, 222 n.14 (Cal. 2000).

303. CAL. PENAL CODE § 14022 (West 2002).

304. See *id.* § 14024.

305. *Id.* § 14024(a)-(g).

306. CAL. DEP'T OF JUSTICE, POLICY AND PROCEDURES MANUAL FOR LOCAL AND STATE PROSECUTING AGENCIES 9 (2000).

307. CAL. PENAL CODE § 14025 (West 2002). A copy of the witness protection agreement is in the Appendix to this Article.

witnesses involved in matters related to organized crime, criminal street gangs, drug trafficking, and other cases involving a high degree of risk.<sup>308</sup>

All information about witnesses in the program is confidential and not subject to disclosure.<sup>309</sup> This raises the question of whether defense counsel is prevented from inquiring of a protected witness's true name, new identity, or current address when the witness testifies at trial. Most likely, this issue will arise in a future proceeding. In federal court, trial judges have allowed witnesses in the program to testify without revealing their new identity when a sufficient showing of danger to the witness has been presented to the court,<sup>310</sup> and have restricted questions on cross-examination about the protection program.<sup>311</sup> Questions about payments and other government support have been allowed, but information about the protection itself has not.<sup>312</sup>

Since its inception, the program has received an annual funding of three million dollars.<sup>313</sup> In its initial year of operation, January 1, 1998 through December 31, 1998, the program opened 125 cases for 154 witnesses, which involved 275 defendants, and also provided protection for 207 family members.<sup>314</sup> Costs totaled almost three quarters of a million dollars.<sup>315</sup> Of these cases, 77% (ninety-six cases) were gang-related, 4% (five cases) involved drug trafficking, 15% (nineteen cases) were high-risk offenses, and 4% (five cases) involved domestic violence.<sup>316</sup> Overall, 96% were crimes of violence, with almost 70% involving murder or attempted murder.<sup>317</sup>

The second year of operation, January 1, 1999 through December 31, 1999, saw an increase of over 200% in the number of new cases.<sup>318</sup> The program opened 379 new cases, which involved 456 witnesses, 665 defendants, and also provided protection for 665 relatives.<sup>319</sup> It is amazing to note that in the first two years of its operation, the program had already served 10% of the total number of people protected in the Federal Witness Protection Program during its twenty-six years of

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308. *Id.* § 14023.

309. *Id.* § 14029.

310. *See* United States v. Watson, 599 F.2d 1149, 1157 (2d Cir. 1979).

311. *See* United States v. Tarantino, 846 F.2d 1384, 1407 (D.C. Cir. 1988).

312. *See id.*

313. CAL. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO THE CALIFORNIA LEGISLATURE 4 (2000).

314. CAL. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO THE CALIFORNIA LEGISLATURE 5 (1999).

315. *Id.*

316. *Id.* at 6.

317. *Id.* at 7.

318. CAL. DEP'T OF JUSTICE, *supra* note 313, at 1.

319. *Id.* at 5.

operation. Of the cases opened in its second year, 71% (272 cases) were gang-related, 5% (nineteen cases) involved drug trafficking, 18% (sixty-eight cases) were high-risk crimes, 1% (two cases) were organized crime, and 5% (eighteen cases) involved domestic violence.<sup>320</sup> Of the total number of cases, 95% were crimes of violence, with 65% involving murder or attempted murder.<sup>321</sup> Total funds encumbered to date were approximately two and one-half million dollars.<sup>322</sup> These figures provide circumstantial evidence of the growth and spread of witness intimidation. Initially, twenty-five counties participated in the program during the first year of operation, but the number grew to thirty-five counties in its second year of operation.<sup>323</sup>

Unlike the federal program, no litigation has been filed under the California program, most likely because it is new. To avoid liability for the safety or misconduct of witnesses participating in witness protection programs, program administrators are advised not to make promises to the witnesses unless the promises can be kept and are approved by those with the authority to comply with such promises.<sup>324</sup> Prior case law will most likely be relied on for the standard of care to be exercised by those who protect the witnesses and family members who enter the program. Because there is no one enforcement agency in charge of protecting the witnesses, the standardization of care and treatment will necessarily be diverse.

In one case, *Carpenter v. City of Los Angeles*, a robbery victim was shot after he testified at a defendant's preliminary hearing.<sup>325</sup> Carpenter sued the City of Los Angeles for the damages he suffered as a result of the shooting, and when he lost at trial, he asked the court of appeal to determine whether the city and its police department owe a duty to their witnesses in criminal cases, to warn them of threats to their lives.<sup>326</sup>

After Carpenter testified at defendant Jenkins's preliminary hearing, Jenkins made a threatening remark to him, which Carpenter relayed to the investigating officer, Detective Williams. Williams told Carpenter essentially not to worry about Jenkins, because he was just "a street

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320. *Id.* at 6.

321. *Id.* at 7.

322. *Id.* at 4.

323. *Id.* at 1.

324. FINN & HEALEY, *supra* note 181, at xii.

325. *Carpenter v. City of Los Angeles*, 281 Cal. Rptr. 500, 500-02 (Ct. App. 1991).

326. *Id.* at 500.

punk.”<sup>327</sup> Thereafter, detectives were informed that Jenkins had a “contract hit” out on Carpenter.<sup>328</sup> That threat was never communicated to Carpenter, who was subsequently shot in the head, abdomen, and legs.<sup>329</sup> After that, Carpenter was placed in a witness protection program and moved to another state.<sup>330</sup>

The court of appeal in *Carpenter* fashioned the following rule: when a criminal prosecution witness is assured by the city that the defendant poses no real danger to the witness’s safety, then a special relationship is established between the witness and the city.<sup>331</sup> This relationship establishes a duty of care owed by the city to the witness. In *Carpenter*, this duty of care obligated the city to warn Carpenter of Jenkins’s threat to his life.<sup>332</sup>

Considerations of policy mandate a finding that the City owed [Carpenter] a duty of care. Reasonable care required that the police, after lulling [Carpenter] into a false sense of security, inform him of this very real threat. We are speaking here of a duty to warn. As evidenced by the Witness Protection Program in which [Carpenter] was placed after being shot, the City already recognizes it has a duty to protect certain witnesses.<sup>333</sup>

This case had an ironic and tragic result. Detective Williams sat with the prosecution at Jenkins’s robbery trial in superior court. After Detective Williams left the courthouse and picked up his son at the Faith Baptist Church School, Jenkins murdered him. Jenkins was subsequently convicted of first degree murder with special circumstances and sentenced to death.<sup>334</sup> He is currently on death row.<sup>335</sup>

Following *Carpenter*, the court of appeal was asked to decide whether the city was negligent for the murder of a witness days before she was to testify for the prosecution.<sup>336</sup> In this case the witness, Demetria, had been threatened personally in a telephone call she received.<sup>337</sup> She informed the detective of the threat, and the detective advised her that he would provide relocation if the threats continued. He did not inform her that the same defendant against whom she was to testify was a suspect in two other murders, that he had been threatening other witnesses, that he was carrying a handgun, and that he was considered a danger to the

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327. *Id.* at 501.

328. *See id.* at 501–02.

329. *Id.* at 502.

330. *Id.*

331. *Id.* at 504.

332. *Id.*

333. *Id.* at 505 (citations omitted) (footnote omitted).

334. *People v. Jenkins*, 997 P.2d 1044, 1066–67 (Cal. 2000).

335. Cal. Dep’t of Corrs., *Male Death Row Inmates*, at [http://www.cdc.state.ca.us/Issues/Capital/PDF/Death\\_Row.pdf](http://www.cdc.state.ca.us/Issues/Capital/PDF/Death_Row.pdf) (Sept. 1, 2002).

336. *Wallace v. City of Los Angeles*, 16 Cal. Rptr. 2d 113, 114–15 (Ct. App. 1993).

337. *Id.* at 116–17.

community at large, especially to any witnesses who might testify against him. The detective knew all of this information at the time the witness received the threats.<sup>338</sup>

The court found that when Demetria agreed to become a witness for the prosecution, she was in a position of peril, which was not of her own making, and which she could not on her own readily discover.<sup>339</sup> The police also “skewed her appreciation” of any danger and, in fact, gave her the impression, by what they did and did not tell her, that she was not in danger. The police, furthermore, placed Demetria in the dangerous position she was in by involving her as a witness, and this special relationship created a duty to warn her of the real danger to her life.<sup>340</sup>

The court concluded:

If we were to hold that an officer can, with impunity, fail to disclose important information to a witness regarding his or her safety, or induce a witness to detrimentally rely on the officer regarding such safety, the number of persons who would henceforth be willing to testify on behalf of the prosecution would most likely fall dramatically. Consequently, so would the number of criminals convicted for their crimes. As the court said in *Carpenter*, “Criminal prosecution would screech to a grinding halt without the assistance of witnesses.”<sup>341</sup>

This conclusion raises the question of whether trial courts, if required to order the discovery of identity of witnesses who have been attacked or threatened, will expose city governments and courts to possible lawsuits if the witness is subsequently killed. Furthermore, any newspaper articles about such ordered discovery may have a chilling effect on other witnesses to come forward and report criminal activity.

## V. WAIVER BY MISCONDUCT

### *A. The Waiver Doctrine Is Based on Principles of Equity and Honesty*

As noted earlier, confrontation, like any constitutional right, may be surrendered either expressly or by conduct. One doctrine that has been in existence since the seventeenth century is the doctrine of “waiver by misconduct.”<sup>342</sup> Succinctly stated, the doctrine provides that

338. *Id.* at 117, 121.

339. *See id.* at 121.

340. *See id.* at 121–22.

341. *Id.* at 126.

342. The Court in *Reynolds v. United States* recounted Lord Morley’s case from the

if a defendant, through misconduct, has prevented a witness from appearing and testifying at his trial, then he has waived his right of confrontation as to that witness and hearsay evidence with respect to that witness's testimony is admissible.<sup>343</sup> The defendant may have procured the witness's nonappearance through threats, acts of violence, or murder; in fact, many cases involve instances where the witness has been murdered.<sup>344</sup> The waiver doctrine has been followed in the federal courts<sup>345</sup> and was codified as a rule of evidence in 1997.<sup>346</sup>

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year 1666, and others which followed it, for the proposition that if a witness was absent from court "by the means or procurement of the prisoner," then hearsay statements of the witness were admissible in place of live testimony. *Reynolds v. United States*, 98 U.S. 145, 158–59 (1878).

343. *See id.* at 158–60.

344. *See, e.g.*, *United States v. Cherry*, 217 F.3d 811, 813–15 (10th Cir. 2000); *United States v. Johnson*, 219 F.3d 349, 352 (4th Cir. 2000); *United States v. Emery*, 186 F.3d 921, 924–26 (8th Cir. 1999); *United States v. White*, 116 F.3d 903, 911 (D.C. Cir. 1997); *United States v. Houlihan*, 92 F.3d 1271, 1278–79 (1st Cir. 1996); *United States v. Thai*, 29 F.3d 785, 798, 814 (2d Cir. 1994); *United States v. Miller*, 116 F.3d 641, 667–68 (2d Cir. 1993); *United States v. Rouco*, 765 F.2d 983, 985 (11th Cir. 1985); *United States v. Thevis*, 665 F.2d 616, 621 (5th Cir. 1982); *United States v. Mastrangelo*, 693 F.2d 269, 270 (2d Cir. 1982).

345. *See, e.g.*, *Magouirk v. Warden*, 237 F.3d 549, 552–53 (5th Cir. 2001); *United States v. Ochoa*, 229 F.3d 631, 639 (7th Cir. 2000); *Johnson*, 219 F.3d at 355; *Cherry*, 217 F.3d at 814–21; *Geraci v. Senkowski*, 211 F.3d 6, 9–10 (2d Cir. 2000); *Emery*, 186 F.3d at 926–27; *Magouirk v. Phillips*, 144 F.3d 348, 361–62 (5th Cir. 1998); *White*, 116 F.3d at 911–16; *Miller*, 116 F.3d at 667–69; *Houlihan*, 92 F.3d at 1278–81; *Thai*, 29 F.3d at 814–15; *United States v. Aguiar*, 975 F.2d 45, 47–48 (2d Cir. 1992); *Bagby v. Kuhlman*, 932 F.2d 131, 135–37 (2d Cir. 1991); *Rouco*, 765 F.2d at 995; *United States v. Potamitis*, 739 F.2d 784, 788–89 (2d Cir. 1984); *Mastrangelo*, 693 F.2d at 272–73; *Steele v. Taylor*, 684 F.2d 1193, 1200–03 (6th Cir. 1982); *Thevis*, 665 F.2d at 630–32; *United States v. Balano*, 618 F.2d 624, 625–30 (10th Cir. 1979); *United States v. Carlson*, 547 F.2d 1346, 1355–60 (8th Cir. 1976).

346. In December 1997, subdivision (b)(6), which codified the waiver by misconduct doctrine, was added to Rule 804 of the *Federal Rules of Evidence*. Rule 804 now provides:

**Rule 804. Hearsay Exceptions; Declarant Unavailable**

(a) Definition of unavailability.: "Unavailability as a witness" includes situations in which the declarant—

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

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

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

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

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

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or

In one of the earliest statements of the waiver doctrine, the *Reynolds* Court discussed the admissibility of a witness's prior trial testimony, when the defendant purposefully prevented the witness from appearing and testifying in court.<sup>347</sup> The defendant had been charged with bigamy. His second wife lived at the defendant's home and an officer had tried several times to serve her with a subpoena to testify at the defendant's current trial, but the defendant had prevented service on the witness. After a hearing about the subpoena service, the trial court found that the witness's nonappearance was caused by the defendant's deliberate acts and, therefore, ruled the witness's prior trial testimony admissible.<sup>348</sup> The court further found that the admission of the prior testimony did not violate the defendant's right to confrontation as to that witness:

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, [the witnesses are] absent by his procurement . . . he is in no condition to assert that his constitutional rights have been violated.<sup>349</sup>

Principles of equity and honesty form the bedrock of the doctrine. Similar to the equitable argument of "clean hands,"<sup>350</sup> the doctrine recognizes the principle that one shall not be allowed to profit from his own wrongful conduct; in turn, this is based on principles of honesty, namely, that one shall not be rewarded for his acts of dishonesty.<sup>351</sup>

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wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

**(b) Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . .

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

FED. R. EVID. 804 (emphasis added).

347. *Reynolds v. United States*, 98 U.S. 145, 158–60 (1878).

348. *See id.* at 159–60.

349. *Id.* at 158.

350. *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982) ("The rule is also based on a principle of reciprocity similar to the equitable doctrine of 'clean hands.'").

351. *See Reynolds*, 98 U.S. at 159.

The rule has its foundation in the maxim that no one shall be permitted to take

Misconduct that procures a witness's unavailability at trial involves an intentional choice by the accused to prevent the admission of crucial evidence—not by the use of legitimate rules of criminal procedure or evidentiary restrictions, but by acts of subterfuge. One who intentionally threatens a witness, attacks a witness, or has another commit such acts at his behest, has freely chosen to use deceptive means to obtain an advantage. When the witness is crucial, such misconduct may decimate the prosecution's case.<sup>352</sup> The loss of that testimony will result in the prosecution being unable to proceed with its case. By precluding this testimony, the defendant has not used the accepted rules of criminal procedure or evidence, but has resorted to nefarious conduct to obtain an advantage or an outright dismissal. Such misconduct also violates the prosecution's right to present its evidence and carry its burden of proof.

When a defendant murders an individual who is a percipient witness to acts of criminality (or procures his demise) in order to prevent him from appearing at an upcoming trial, he denies the government the benefit of the witness's live testimony. In much the same way, when a defendant murders such a witness (or procures his demise) in order to prevent him from assisting an ongoing criminal investigation, he is denying the government the benefit of the witness's live testimony at a future trial.<sup>353</sup>

In cases where the defendant's misconduct procures the unavailability of a witness, this misconduct, rather than the applicable legal principles, may determine the outcome. The outcome may be based on the defendant's chicanery, rather than on reliable evidence tested by the trier of fact, who has the opportunity to listen to the witness and judge his or her credibility. If the witness does testify, but the defendant's intimidation causes the witness to give false, incomplete or misleading testimony, cross-examination may or may not bring out the truth. Even if cross-examination does bring out the truth, the misconduct by the defendant will introduce false evidence into the record, which may produce an unjust decision.<sup>354</sup> In this way, the defendant's misconduct undermines the integrity of the adversary process, the very system which the Confrontation Clause was intended to protect, and is, therefore, necessarily dishonest and inequitable.

Since its initial formulation, the doctrine has undergone numerous changes. As noted, it has been codified into a federal rule of evidence

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advantage of his own wrong . . . . We are content with this long-established usage, which, so far as we have been able to discover, has rarely been departed from. It is the outgrowth of a maxim based on the principles of common honesty, and, if properly administered, can harm no one.

*Id.*

352. See *supra* note 6 (defining the term "crucial witness").

353. *United States v. Houlihan*, 92 F.3d 1271, 1279–80 (1st Cir. 1996).

354. *Morgan v. Bennett*, 204 F.3d 360, 367 (2d Cir. 2000).



and the Advisory Committee observed that the rule was intended

to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself."<sup>355</sup>

The doctrine encompasses not only situations where the defendant's acts were the direct cause of the witness unavailability, but also those cases where third parties have caused the witness's unavailability, either at the behest of the defendant or in a conspiracy with the defendant.<sup>356</sup> As a result, co-conspirators are subject to the doctrine if their acts are "in furtherance and within the scope of an ongoing conspiracy and reasonably foreseeable as a natural or necessary consequence thereof."<sup>357</sup> Moreover, the doctrine has expanded to allow into evidence not only prior trial testimony, but also grand jury testimony,<sup>358</sup> as well as statements to police officers and other unsworn extrajudicial statements.<sup>359</sup>

The courts that have utilized the doctrine have required an evidentiary hearing, wherein the proponent of the hearsay evidence must carry its burden of proof by a preponderance of the evidence.<sup>360</sup> Some courts have found that the failure to hold an evidentiary hearing is harmless

355. FED. R. EVID. 804 advisory committee's note (quoting *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982)). The Advisory Committee also noted that the wrongful act need not be a criminal act. *Id.*

356. *See, e.g.*, *United States v. Dhinsa*, 243 F.3d 635, 653–54 (2d Cir. 2001); *United States v. Cherry*, 217 F.3d 811, 820–21 (10th Cir. 2000).

357. *Cherry*, 217 F.3d at 820.

358. *See, e.g.*, *Geraci v. Senkowski*, 211 F.3d 6, 9–10 (2d Cir. 2000); *United States v. Potamitis*, 739 F.2d 784, 788–89 (2d Cir. 1984); *United States v. Mastrangelo*, 693 F.2d 269, 272–73 (2d Cir. 1982); *United States v. Thevis*, 665 F.2d 616, 627–30 (5th Cir. 1982); *United States v. Balano*, 618 F.2d 624, 629–30 (10th Cir. 1979); *United States v. Carlson*, 547 F.2d 1346, 1360 (8th Cir. 1976).

359. *See, e.g.*, *Dhinsa*, 243 F.3d at 650–57; *United States v. Ochoa*, 229 F.3d 631, 639–41 (7th Cir. 2000); *United States v. Johnson*, 219 F.3d 349, 355–56 (4th Cir. 2000); *Cherry*, 217 F.3d at 819–21; *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999); *United States v. White*, 116 F.3d 903, 911 (D.C. Cir. 1997); *United States v. Miller*, 116 F.3d 641, 667–68 (2d Cir. 1997); *United States v. Houlihan*, 92 F.3d 1271, 1279–80 (1st Cir. 1996); *United States v. Thai*, 29 F.3d 785, 814–15 (2d Cir. 1994); *United States v. Aguiar*, 975 F.2d 45, 47–48 (2d Cir. 1992); *United States v. Rouco*, 765 F.2d 983, 993–95 (11th Cir. 1985).

360. Only one court prior to the codification of the doctrine required proof by clear and convincing evidence. *Thevis*, 665 F.2d at 630–31.

error.<sup>361</sup> In *Reynolds*, the Court noted that although the defendant was present at the hearing on service of subpoena, he failed to provide any contrary evidence.<sup>362</sup> Other courts have interpreted this as an indication by the Supreme Court that the proponent of the hearsay evidence has the burden of persuasion by a preponderance test as in preliminary fact determinations; however, once this burden is met, adverse inferences may be drawn from the defense's failure to offer credible evidence to the contrary.<sup>363</sup>

Courts have also applied the doctrine when no charges have been filed against the defendant at the time of the misconduct.<sup>364</sup> As long as it is reasonably foreseeable that an investigation will culminate in the bringing of criminal charges, the fact that the misdeed occurred at an earlier stage should not affect the operation and application of the doctrine.<sup>365</sup> A contrary approach would create an incentive to accelerate the timetable and murder witnesses earlier rather than later.<sup>366</sup> The doctrine has been applied in this context even though the right to confront is a trial right.<sup>367</sup>

The waiver doctrine does not penalize the defendant, but rather attempts to level the uneven playing field created by the misconduct of the accused.<sup>368</sup> Since the defendant has, by his contrivance, prevented the witness from appearing and testifying, it would be an absurdity to permit the same person to claim that his constitutional right to confront and cross-examine the witness has been violated. Acquiescence to such an objection would result in the prosecution losing valuable evidence, because the hearsay statements would be inadmissible. Acquiescence would also result in rewarding the defendant for his misdeed. The very testimony that the defendant intended to prevent the jury from hearing would be unavailable to the prosecution; such a result was specifically eschewed by the *Reynolds* Court.<sup>369</sup> The better view is that the

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361. See, e.g., *Johnson*, 219 F.3d at 356; *Miller*, 116 F.3d at 669.

362. *Reynolds v. United States*, 98 U.S. 145, 160 (1878).

363. See *White*, 116 F.2d at 911–13; *Houlihan*, 92 F.3d at 1278–83; *Thevis*, 665 F.2d at 632–33; *Morgan v. Bennett*, 204 F.3d 360, 367–68 (2d Cir. 2000).

364. See, e.g., *Dhinsa*, 243 F.3d at 652; *Emery*, 186 F.3d at 925–26; *Miller*, 116 F.3d at 667; *Houlihan*, 92 F.3d at 1279.

365. *Houlihan*, 92 F.3d at 1280.

366. *Id.*

367. See *id.* at 1279.

368. See *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982); *White*, 116 F.3d at 912; *Houlihan*, 92 F.3d at 1280–83; *Magouirk v. Phillips*, 144 F.3d 348, 361–62 (5th Cir. 1998); *Mastrangelo*, 693 F.2d at 272–73; *Balano*, 618 F.2d at 629; *Carlson*, 547 F.2d at 1359 & n.12.

369. If the testimony is not presented at trial, then the defendant has profited from his misconduct. This result is contrary to the principle enunciated by the *Reynolds* Court. *Reynolds v. United States*, 98 U.S. 145, 158 (1878) (stating that courts will not allow a party to profit from his own wrongdoing).

defendant has waived his right of confrontation and cannot complain that he was denied the right to confront and cross-examine the witness, because he was the instrument of the witness's nonappearance.<sup>370</sup> To limit the introduction of such evidence would limit the proof against the defendant, the very result which the waiver doctrine seeks to remedy.<sup>371</sup> These same basic principles should obtain when the doctrine is applied to withholding the identity of threatened witnesses, as will be shown.

*B. A Defendant Who Has Threatened or Attacked a Crucial Witness  
Has Waived His Right to Know the Witness's Identity*

*I. Introduction*

There is no reason why the waiver by misconduct doctrine should not be extended to allow the nondisclosure of a threatened witness's identity. There are several reasons that weigh in favor of nondisclosure, including public policy,<sup>372</sup> equity, and fairness.<sup>373</sup> Each of these factors, as will be shown, tip the balance in favor of the witness's rights as opposed to the defendant's right of confrontation, and thus weigh against disclosure.<sup>374</sup>

Admittedly, there are differences between the issue of witness identity nondisclosure and the issue originally addressed by the waiver doctrine, that is, the defendant's procurement of a witness's unavailability at trial. Unlike the waiver doctrine's traditional application, where the witness is identified but not presented at trial, application of the doctrine to allow the nondisclosure of a threatened witness's identity would involve a witness who is presented at trial, but not identified. Moreover, allowing the nondisclosure of witness identity would not involve the admission of hearsay evidence because the witness himself would testify in court. These differences, however, do not preclude extending the doctrine to

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370. See *Carlson*, 547 F.2d at 1359.

371. *Dhinsa*, 243 F.3d at 652–53.

372. Public policy considerations may limit the scope of the right of confrontation. *Maryland v. Craig*, 497 U.S. 836, 844–49 (1990); *Coy v. Iowa*, 487 U.S. 1012, 1020–21 (1988); *Ohio v. Roberts*, 448 U.S. 56, 62–65 (1980); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

373. See *Reynolds*, 98 U.S. at 158–59.

374. See *Craig*, 497 U.S. at 844–45 (“In holding that the use of this procedure violated the defendant’s right to confront witnesses against him, we suggested that any exception to the right ‘would surely be allowed only when necessary to further an important public policy.’”).

allow for nondisclosure of a witness's identity if the witness's life has been threatened by the defendant's misconduct.<sup>375</sup>

Invocation of the waiver by misconduct doctrine to preclude identifying the witness would require an evidentiary hearing at which the prosecution would be required to prove by a preponderance of the evidence<sup>376</sup> (1) that the defendant, or another at his behest, has threatened the life of the witness or a member of the witness's immediate family; (2) that the defendant has the means and capability of carrying out the threat; (3) that the defendant caused the witness's fear;<sup>377</sup> (4) that the action was taken with the intention of preventing the witness from testifying;<sup>378</sup> and (5) that the witness is in actual fear for his or her life, or for the lives of family members. If all of these elements are proved by a preponderance of the evidence, then the witness's identity is foreclosed from disclosure to the defense.

## 2. *Public Policy Considerations Weigh in Favor of Nondisclosure*

In one of its earlier opinions, the United States Supreme Court addressed the admissibility at the defendant's retrial of prior trial testimony given by two witnesses who had died since the first trial.<sup>379</sup> The issue was whether the admission of the prior trial testimony violated

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375. Although it may seem unlikely that a witness could be attacked or threatened and the accused not know the person's identity, there are several ways this is possible. First, not all defendants are in custody throughout their proceedings and, thus, have the ability to follow a witness. Furthermore, a witness may have been present at pretrial hearings and followed from the courtroom by the defendant or by cohorts of the defendant. Or, the witness's identity may have been disclosed to the defense, but because of threats the witness may have been given a new identity. Of course, there are other possible scenarios in which this issue may arise.

376. California Evidence Code section 115 provides:

"Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.

CAL. EVID. CODE § 115 (West 1995 & Supp. 2002).

377. See *United States v. Mastrangelo*, 693 F.2d 269, 273-74 (2d Cir. 1982) (holding that the defendant's knowledge of a plot to kill a witness and a failure to give a warning to the appropriate authorities is sufficient to constitute a waiver to the admission of hearsay evidence).

378. See *United States v. Houlihan*, 92 F.3d 1271, 1280 (1st Cir. 1996).

379. *Mattox v. United States*, 156 U.S. 237, 251 (1895). In *Mattox*, a capital case, the judgment in the first trial was reversed and a second trial resulted in a hung jury. In a third trial the accused was found guilty and sentenced to death. *Id.*

the defendant's right of confrontation.<sup>380</sup>

During the course of its discussions, the Court balanced the defendant's confrontation right against public policy considerations and the necessities of the case.<sup>381</sup> The Court acknowledged, on the one hand, the safeguards embodied in the constitutional protection of confrontation, but found, on the other hand, that the rights of the people may, in certain cases, outweigh the need for these safeguards.<sup>382</sup> The Court concluded that when the safety of the public is imperiled, and the rights of the accused are otherwise protected, "[a] technical adherence to the letter of a constitutional provision" is outweighed by the concern for public safety.<sup>383</sup> Moreover, exceptions to the right of confrontation may be required by the necessities of a case in order "to prevent a manifest failure of justice."<sup>384</sup> In determining when an exception is required, the Court stated that public policy considerations, such as public safety and society's interest in justice, should be weighed against the

380. *Id.* at 240–44, 251.

381. *Id.* at 243 ("But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case.").

382. *Id.* ("The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."); *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988) ("It is true that we have in the past indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests."); *id.* at 1021 ("We leave for another day whether any exceptions exist. Whatever they may be, they would surely be allowed only when necessary to further an important public policy."); *id.* at 1025 (O'Connor, J., concurring) ("In short, our precedents recognize a right to face-to-face confrontation at trial, but have never viewed that right as absolute . . . . Thus, I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if procedure was necessary to further an important public policy.").

The court, however, has recognized that competing interests, if "closely examined," . . . may warrant dispensing with confrontation at trial. "General rules of law of this kind, however beneficent and valuable in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case."

*Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)); *see also Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) ("Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.").

383. *Mattox*, 156 U.S. at 243. ("A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant.").

384. *Id.* at 244 ("[Hearsay statements] are admitted . . . as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice.").

defendant's right of confrontation.<sup>385</sup> The Court concluded that such policy concerns may, in certain cases, outweigh the constitutional right of the defendant.

As Justice Cardozo wrote:

The law . . . is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.<sup>386</sup>

There are several public policy concerns in favor of nondisclosure. Building public confidence in our criminal justice system and maintaining an effective criminal justice system are both public policy goals of the highest order.<sup>387</sup> Witness intimidation undermines the criminal justice system, erodes confidence in the government's ability to protect its citizens, and degrades the integrity of the judicial process.<sup>388</sup> Nondisclosure of threatened witness identities would help to ameliorate these effects.

Another public policy concern favoring nondisclosure is the encouragement of citizens to report their knowledge of criminal activity. Citizen cooperation is critically important to law enforcement.<sup>389</sup>

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385. See *id.* at 242–44; *Maryland v. Craig*, 497 U.S. 836, 850 (1990) (finding that the right to confront and cross-examine witnesses must be interpreted in the context of the necessities of the trial, the adversary process, and with concern for public policy); *id.* at 849 (“In sum, our precedents establish that ‘the Confrontation Clause reflects a preference for face-to-face confrontation at trial,’ . . . a preference that ‘must occasionally give way to considerations of public policy and the necessities of the case.’” (emphasis in original) (citations omitted)); *id.* at 852 (“The critical inquiry in this case . . . is whether use of the procedure is necessary to further an important state interest.”); *id.* at 853 (“We likewise conclude today that a State’s interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant’s right to face his or her accusers in court.”).

[W]here necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child’s ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.

*Id.* at 857.

386. *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

387. See *Wallace v. City of Los Angeles*, 16 Cal. Rptr. 2d 113, 127 (Ct. App. 1993).

388. See *Morgan v. Bennett*, 204 F.3d 360, 367 (2d Cir. 2000); see also *supra* notes 181–86 and accompanying text.

389. See *McCray v. Illinois*, 386 U.S. 300, 308 (1967); *Lewis v. United States*, 385 U.S. 206, 210 & n.6 (1966); *Roviaro v. United States*, 353 U.S. 53, 59–60 (1957); *United States v. Sanchez*, 988 F.2d 1384, 1391 (5th Cir. 1993); *United States v. Toombs*, 497 F.2d

Without citizen cooperation, the criminal justice system would grind to a halt.<sup>390</sup> Such cooperation is thwarted, however, by community intimidation.<sup>391</sup> Gang members commonly assault individuals in full view of other neighborhood residents in order to intimidate the residents and to dissuade them from reporting criminal activity to the police.<sup>392</sup> Respect in the gang subculture is often synonymous with fear. Retaliatory murders are committed to promote respect for the gang and intimidate those outside the gang. This is well-known in the criminal justice system.<sup>393</sup> If law enforcement fails to protect those who come forward with information about criminal activity even after they are attacked and threatened, other citizens will be discouraged from reporting future criminal activity. Requiring disclosure of a threatened witness's identity will weaken other citizens' resolve to perform their civic and moral duty to report crime. This result is contrary to the important policy goal of encouraging citizens to report crime.<sup>394</sup>

Yet another public policy concern is the safety of witnesses who testify. Disclosure of a witness's identity to the defense after the witness has been attacked or threatened by the defendant exposes the witness to possibly lethal consequences. There should be "a greater level of official concern and action promotive of witness safety" and "the long term result surely will be an increase in both the effectiveness of the criminal justice system and the level of public confidence in it. The attainment of that result is certainly a public policy goal of very high priority."<sup>395</sup>

Our government also has a strong interest in assuring prospective witnesses that they will be free to attend trial to testify as a witness, without fear of intimidation or threats.<sup>396</sup> Moreover, as will be shown, government has a duty and obligation to act in order to protect a witness's constitutional right to testify.<sup>397</sup>

By encouraging witnesses to report crime and to testify, nondisclosure

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88, 91–92 (5th Cir. 1974); *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969).

390. *See* CAL. PENAL CODE § 679 (West 1999).

391. *See supra* Part IV.A.2.

392. *See* *People v. Gardeley*, 927 P.2d 713, 722 (Cal. 1996).

393. *See* *People v. Olguin*, 37 Cal. Rptr. 2d 596, 611 (Ct. App. 1994).

394. *See* *McCray v. Illinois*, 386 U.S. 300, 308 (1967).

395. *Wallace v. City of Los Angeles*, 16 Cal. Rptr. 2d 113, 127 (Ct. App. 1993).

396. *See* *United States v. Pacelli*, 491 F.2d 1108, 1113 (2d Cir. 1974) (holding that the right to testify is one guaranteed by law).

397. *See infra* notes 433–39 and accompanying text.

also favors the important policy goal of effective law enforcement. In the analogous case of confidential reliable informants, there is a government privilege to withhold the identity of persons who furnish information to police officers. This privilege is meant to further and to protect the public interest in effective law enforcement.<sup>398</sup> Usually, informants condition their cooperation on an assurance of anonymity to protect themselves and their families from harm.<sup>399</sup> Law enforcement, in turn, depends greatly on information from informants in order to solve crimes. Disclosing informants' identities ends their usefulness to government and discourages others from cooperating.<sup>400</sup> Furthermore, public policy forbids disclosure of confidential informants' identities unless essential to the defense and material on the issue of guilt.<sup>401</sup> But even in the case of confidential informants, there is no fixed rule as to disclosure, and decisions must be made "balancing the public interest in protecting the flow of information against the individual's right to prepare his defense."<sup>402</sup> "Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."<sup>403</sup>

Courts have long recognized the difficulty prosecutors and police have in obtaining witness cooperation when the witness's life may be in danger.<sup>404</sup>

As our society becomes increasingly violent in its daily human interactions, more and more people are called upon to be witnesses in the prosecution of those causing the violence. Yet, as the number of these potential witnesses grows, so also does the likelihood that they, or their families, will be subjected to violence by the very criminal defendants against whom they will give testimony. Thus, the old phrase "violence begets violence" takes on a new

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398. *Roviaro v. United States*, 353 U.S. 53, 59 (1957) ("The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.").

399. *McCray*, 386 U.S. at 308.

400. *See id.* at 308; *Dep't of Justice v. Landano*, 508 U.S. 165, 179–81 (1993); *Lewis v. United States*, 385 U.S. 206, 208–10 (1966); *United States v. Sanchez*, 988 F.2d 1384, 1391 (5th Cir. 1993); *United States v. Toombs*, 497 F.2d 88, 94 (5th Cir. 1974); *United States v. Twomey*, 460 F.2d 400, 401–03 (7th Cir. 1972); *United States v. Ellis*, 468 F.2d 638, 639 (9th Cir. 1972); *United States v. Palermo*, 410 F.2d 468, 472–73 (7th Cir. 1969).

401. *See Scher v. United States*, 305 U.S. 251, 254 (1938).

402. *McCray*, 386 U.S. at 310 (quoting *Roviaro*, 353 U.S. at 62); *id.* at 312 ("In sum, the Court in the exercise of its power to formulate evidentiary rules for federal criminal cases has consistently declined to hold that an informer's identity need always be disclosed in a federal criminal trial . . .").

403. *Roviaro*, 353 U.S. at 62.

404. *Palermo*, 410 F.2d at 472 ("This Court is not unaware of the problem that the government has in obtaining witnesses in cases where a witness' life may be in jeopardy if he testifies."); *see also Alvarado v. Superior Court*, 5 P.3d 203, 222 (Cal. 2000).



meaning. The threat to the safety of these witnesses is very real, especially when the defendant has gang or drug trafficking affiliations. Unfortunately, the lack of safeguards for such witnesses is also very real.

Society reaps enormous benefits when a witness's testimony succeeds in getting a criminal off the streets and placed behind bars. Society must be willing to pay for that benefit by affording necessary protection to both the witness *and* his family, for the threat of violence against a witness's family will often silence the witness. Without a continuing and visible public commitment to such protection, it is unrealistic to expect citizens to come forward and provide the information so critical to the successful operation of the criminal justice system. To the extent that government fails to meet this essential responsibility, it cedes control of our cities to the criminals.

If the result which we reach in the case before us brings about a greater level of official concern and action promotive of witness safety, and an appropriate devotion of public resources to that end, the long term result surely will be an increase in both the effectiveness of the criminal justice system and the level of public confidence in it. The attainment of that result is certainly a public policy goal of very high priority.<sup>405</sup>

Indeed, several courts have found that where there is a threat to the life of a witness, the right of the defendant to have the witness's true name, address, and other personal information is not absolute.<sup>406</sup> Thus, the public has a great interest in effective law enforcement and the government, in turn, recognizes that citizens have an obligation to inform law enforcement of criminal activity that is within their knowledge.<sup>407</sup> Preserving their anonymity, when possible, encourages citizens to perform their obligation.<sup>408</sup> Justice O'Connor recently opined that "[m]ost people would think that witnesses to a gang-related murder likely would be unwilling to speak to the [FBI] except on the condition of confidentiality."<sup>409</sup>

Finally, there is a strong public interest in blocking an accused's attempt to subvert the criminal prosecution by threatening or attacking material witnesses who have information which inculpates the accused. This is misconduct of the highest order, detrimental to the ability of government to carry out its duties and obligations to prosecute crime and to protect its citizens. "[T]he first duty of government by consent [is] maintenance of the public order." The government has an obligation not

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405. *Wallace v. City of Los Angeles*, 16 Cal. Rptr. 2d 113, 126-27 (Ct. App. 1993).

406. *See, e.g., Palermo*, 410 F.2d at 472; *United States v. Varella*, 692 F.2d 1352, 1356 (11th Cir. 1982); *United States v. Rangel*, 534 F.2d 147, 148 (9th Cir. 1976); *United States v. Ellis*, 468 F.2d 638, 639 (9th Cir. 1972); *United States v. Twomey*, 460 F.2d 400, 403 (7th Cir. 1972).

407. *See Roviato*, 353 U.S. at 59.

408. *Id.*

409. *Dep't of Justice v. Landano*, 508 U.S. 165, 179 (1993).

only “to promote the interest of all, [but] to prevent the wrongdoing of one resulting in injury to the general welfare.”<sup>410</sup>

Thus, in this narrow circumstance, when a defendant is responsible for the threats or attacks which cause a witness to fear for his life, competing public policy interests warrant dispensing with the defendant’s right to know that witness’s identity.<sup>411</sup> The necessities of this fact situation override the defendant’s right to know the witness’s identity.<sup>412</sup>

### 3. *Equitable Principles Weigh in Favor of Nondisclosure*

The equitable doctrine that “no one shall be permitted to take advantage of his own wrong” is “based on the principles of common honesty.”<sup>413</sup> The primary purpose of the waiver by misconduct doctrine is to prevent a wrongdoer from profiting in a court of law by reason of his misdeeds.<sup>414</sup> A defendant may not claim a violation of his constitutional rights when his own misconduct created the violation. Not only would it be unfair and morally wrong to allow one to use dishonest means to attain a legal advantage, it would create an incentive for others to so act.<sup>415</sup> Thus, one who intimidates or attacks a witness to prevent that witness from testifying should not be allowed to assert a denial of his right of confrontation based on the prosecution’s intent to withhold the identity of that witness, because the witness’s fear and threatened status is due to the defendant’s acts and threats. The waiver doctrine provides in those circumstances that the defendant “cannot insist on his privilege,” since by his own wrongful conduct he has waived his confrontation rights as to that witness.<sup>416</sup>

In considering a defendant who asserted a constitutional violation because his trial proceeded during his voluntary absence, the United States Supreme Court stated the following:

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410. *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 605 (Cal. 1997) (quoting *In re Debs*, 158 U.S. 564, 584 (1895)).

411. *Cf. Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (Thus in certain narrow circumstances “competing interests, if ‘closely examined,’ . . . may warrant dispensing with confrontation at trial.” (citation omitted)); *accord Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Maryland v. Craig*, 497 U.S. 836, 849 (1990); *Coy v. Iowa*, 487 U.S. 1012, 1020–21 (1988).

412. A preference for face-to-face confrontation at trial “must occasionally give way to considerations of public policy and the necessities of the case.” *Mattox v. United States*, 156 U.S. 237, 243 (1895); *accord Craig*, 497 U.S. at 849.

413. *Reynolds v. United States*, 98 U.S. 145, 159 (1878).

414. *United States v. Houlihan*, 92 F.3d 1271, 1282–83 (1st Cir. 1996).

415. *See id.* at 1280 (“Not allowing the statement of a witness made before charges were filed would serve as a prod to the unscrupulous to accelerate the time table and murder suspected snitches sooner rather than later.”).

416. *Reynolds*, 98 U.S. at 158; *accord Mattox*, 156 U.S. at 242.

The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of courts and juries and turn them into a solemn farce, and ultimately compel society, for its own safety, to restrict the operation of the principle of personal liberty. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong.<sup>417</sup>

The doctrine of waiver by misconduct protects the integrity of the adversary process by deterring attempts by defendants to prevent the testimony of adverse witnesses.<sup>418</sup> The waiver doctrine is somewhat similar to the equitable doctrine of clean hands, that one cannot complain of a wrong committed by another while he himself is guilty of having committed wrongful acts.<sup>419</sup> To attack, or threaten a material witness in order to prevent that witness's testimony at trial, and yet demand disclosure of the witness's identity based on the claim of a constitutional right to that knowledge, is more egregious because the alleged violation is created by the one who would assert it. The law will not sanction the practice of threatening witnesses and should not permit such conduct to benefit the defendant.<sup>420</sup>

As stated earlier, the central concern of the Confrontation Clause is to provide a procedure which will insure the reliability of the evidence offered against a defendant. But the "Sixth Amendment does not stand as a shield to protect the accused from his own misconduct or chicanery."<sup>421</sup> When a defendant's misconduct violates the heart of the procedure put in place to protect his rights, he should not be afforded the protection of the Clause.<sup>422</sup> In other words, the accused should not be permitted to assert a denial of his confrontation rights when refused the identity of the witness, when he himself was the instrument and cause of the denial.<sup>423</sup> When confrontation becomes impossible due to the very person who would assert that right, equity should intervene to provide

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417. *Diaz v. United States*, 223 U.S. 442, 458 (1912) (quoting *Falk v. United States*, 15 App. D.C. 446, 460 (1899)).

418. *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982).

419. *Id.*

420. *United States v. Carlson*, 547 F.2d 1346, 1359 (8th Cir. 1976).

421. *United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985) (quoting *Carlson*, 547 F.2d at 1359).

422. *See Carlson*, 547 F.2d at 1359.

423. *See United States v. White*, 116 F.3d 903, 911 (D.C. Cir. 1997); *United States v. Dhinsa*, 243 F.3d 635, 652 (2d Cir. 2001).

that the right has been waived.<sup>424</sup>

Just as a defendant who has removed an adverse witness through murder is in no position to complain about losing the chance to cross-examine the witness,<sup>425</sup> so is the defendant in a weak position to complain about not knowing a witness's identity when he is the cause of possible lethal consequences feared by the witness. Withholding the witness's identity partially offsets the harm caused by the defendant's wrongful actions.<sup>426</sup> A contrary rule would serve as an incentive to perpetuate this type of wrongful conduct.<sup>427</sup>

The Confrontation Clause was meant to protect against the use of anonymous accusers; however, anonymous accusers originally referred to individuals who signed declarations, did not attend trial, did not swear to the truth of their statements, and did not face the triers of fact or the defendant. The situation is quite different where a crucial witness's identity is withheld but the witness does attend trial, does swear to tell the truth, does testify before the trier of fact and the defendant, face-to-face, and is subject to cross-examination. Thus, even if the witness is unnamed, the witness is not anonymous in the sense of the Star Chamber declarants. The witness, unlike those declarants, is subject to cross-examination and has been the subject of whatever discovery is available. As an alternative, an independent third attorney and investigator could be appointed by the court and given the witness's identity. That team could investigate the witness's background and report its findings only to the defense, but not the witness's name, and in this way, a barrier is provided to prevent accidental dissemination of the witness's identity.

Simple equity, therefore, also supports the conclusion that the accused may not assert a violation of his confrontation rights as to that witness's identity. Just as the Clause was designed to protect against the dangers of untested testimony by anonymous accusers, the waiver doctrine is designed to protect against the dangers of misconduct by the accused. By such misconduct an accused may forfeit the protections afforded under the Clause and allow the nondisclosure of a witness's identity.<sup>428</sup> In construing the balance, the main interest that must be offset against the government's need to withhold the witness's identity is the accused's right of confrontation. "Once the confrontation right is lifted from the

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424. See *United States v. Thevis*, 665 F.2d 616, 630 (5th Cir. 1982).

425. See *White*, 116 F.3d at 911; *Dhinsa*, 243 F.3d at 652.

426. See *White*, 116 F.3d at 911.

427. See *Dhinsa*, 243 F.3d at 652.

428. See *United States v. Sanchez*, 988 F.2d 1384, 1391–92 (5th Cir. 1993); *United States v. Varella*, 692 F.2d 1352, 1356 (11th Cir. 1982); *United States v. Rangel*, 534 F.2d 147, 148 (9th Cir. 1976); *United States v. Ellis*, 468 F.2d 638, 639 (9th Cir. 1972); *United States v. Jordan*, 466 F.2d 99, 101–02 (4th Cir. 1972).

scales by operation of the accused's waiver of that right, the balance tips sharply in favor" of the protection of the witness's identity.<sup>429</sup>

The law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him. To permit such subversion of a criminal prosecution "would be contrary to public policy, common sense, and the underlying purpose of the confrontation clause," . . . and make a mockery of the system of justice that the right was designed to protect.<sup>430</sup>

Once the defendant has waived his right of confrontation by misconduct, he has a fortiori waived his right of cross-examination. Thus, he has waived his right to know the witness's identity. The law has never countenanced piecemeal waivers; thus, a waiver by misconduct would be a waiver as to all aspects of the right.<sup>431</sup>

#### 4. *Balancing of Witness's Rights Against Those of the Defendant Weighs in Favor of Nondisclosure*

Yet another factor weighs in favor of nondisclosure: on balance, the rights of witnesses outweigh those of the accused. Cases that discuss the issue of nondisclosure fail to also discuss the rights, duties, and obligations of witnesses. In fact, not much is written about the obligations society and the law place on those who, through happenstance, become crucial witnesses in criminal prosecutions.<sup>432</sup> It is

429. See *United States v. Houlihan*, 92 F.3d 1271, 1281 (1st Cir. 1996) (stating that the balance tips in favor of the need for evidence once the defendant waives his right of confrontation); *Thevis*, 665 F.2d at 632–33 (stating that once the defendant's interest in confrontation is removed by waiver, the balance tips in favor of the need for evidence).

430. *United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985) (alteration in original) (quoting *Thevis*, 665 F.2d at 630 (quoting *United States v. Carlson*, 547 F.2d 1346, 1359 (8th Cir. 1976))); *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982); *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982).

431. See *Diaz v. United States*, 223 U.S. 442, 452–53 (1912) ("As here the accused, by his voluntary act, placed in evidence the testimony disclosed by the record in question, and thereby sought to obtain an advantage from it, he waived his right of confrontation as to that testimony and cannot now complain of its consideration."); *United States v. White*, 116 F.3d 903, 912 (D.C. Cir. 1997); *Houlihan*, 92 F.3d at 1281 ("[Defendants'] misconduct waived not only their confrontation rights but also their hearsay objections, thus rendering a special finding of reliability superfluous."); *United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992) ("A defendant who procures a witness's absence waives the right of confrontation for all purposes with regard to that witness, not just to the admission of sworn hearsay statements."); *Thevis*, 665 F.2d at 630 ("[W]aiver of . . . confrontation [necessarily includes] a waiver of any hearsay objection.").

432. Under the law, crime victims and witnesses have a civil and moral duty to cooperate with law enforcement and prosecutors in the prosecution of criminal cases.

interesting that none of these cases discuss the constitutional rights of affected witnesses, even though that discussion is important to any balancing test. Therefore, in order to balance the accused's rights as to those threatened witnesses, it is essential to examine the rights granted to crime victims and witnesses.

Since 1895, the United States Supreme Court has recognized that citizens have not only a civic duty to report crime, but a constitutional right to do so.<sup>433</sup> Admittedly, there is no language in the Constitution which specifically grants that right, but the right is intrinsic to, and arises from, the very creation and establishment of our government, and as such, is a right secured to all by the Constitution.<sup>434</sup>

Government, in turn, has an important interest in the public health and safety of its citizens. Under its *parens patriae* powers, it also has a duty to care for its citizens. And, under its police powers, government has an obligation and duty to protect its citizens from the criminal tendencies of others.<sup>435</sup> Anyone who conspires to violate a citizen's right to report crime is subject to punishment.<sup>436</sup> In that regard, government has a corresponding duty to protect citizens from violence occasioned by the exercise of their right to report crime.<sup>437</sup> "By entering society,

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*See* CAL. PENAL CODE § 679 (West 1999); *see also In re Quarles*, 158 U.S. 532, 535–36 (1895) ("It is . . . [a citizen's] right and his duty to communicate to the executive officers any information which he has of the commission of an offence against those laws; and such information, given by a private citizen, is a privileged and confidential communication . . ."); *Roviaro v. United States*, 353 U.S. 53, 59 (1957) ("The privilege [to withhold a confidential informant's identity] recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation."); *see also United States v. Sanchez*, 988 F.2d 1384, 1391 (5th Cir. 1993); *United States v. Toombs*, 497 F.2d 88, 92 (5th Cir. 1974).

433. *Quarles*, 158 U.S. at 536 ("The right of a citizen informing of a violation of law . . . does not depend upon any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action.")

434. *Id.* at 536–37 ("The necessary conclusion is, that it is the right of every private citizen of the United States to inform a marshal . . . of a violation of the . . . laws of the United States; that this right is secured to the citizen by the Constitution of the United States . . .").

435. '*Parens patriae*' literally, 'parent of the country' refers traditionally to the role of the state as sovereign and guardian of persons under a legal disability to act for themselves. . . . Recently, the doctrine has been used to allow the state to recover damages to quasi-sovereign contracts wholly apart from recoverable injuries to individuals residing within the state. These quasi-sovereign interests have included the health, comfort and welfare of the people . . . .  
*West Virginia v. Charles Pfizer & Co.*, 440 F.2d 1079, 1089 (2d Cir. 1971); *see also Kent v. United States*, 383 U.S. 541, 554–60 (1966).

436. *See Quarles*, 158 U.S. at 538 ("[A] conspiracy to injure, oppress, threaten, or intimidate him in the free exercise or enjoyment of this right, or because of his having exercised it, is punishable . . .").

437. *Id.* at 536 ("[I]t is the duty of that government to see that he may exercise this

individuals give up the unrestrained right to act as they think fit; in return, each has a positive right to society's protection." Montesquieu describes this civil liberty as "that tranquillity of spirit which comes from the opinion each one has of his security, and in order for him to have this liberty the government must be such that one citizen cannot fear another citizen."<sup>438</sup>

Citizens also have a duty to assist in prosecuting and securing the punishment of those who violate the law.<sup>439</sup> Furthermore, citizens have a duty to testify in criminal prosecutions.<sup>440</sup> In fact, if an individual is a material witness in a criminal prosecution, and refuses to appear in court, the law provides for the arrest and incarceration of that person until trial.<sup>441</sup>

Because citizens have a constitutional duty to report criminal activity and assist in its prosecution, it follows axiomatically that citizens have a constitutional right to testify at trial. As the *Quarles* court observed, the right of a "private citizen . . . [to] assis[t] in putting in motion the course of justice" and the right "to act as part of the *posse comitatus* in upholding the laws" of this country, are secured by the Constitution.<sup>442</sup> Because prosecuting criminal cases involves trials and trial testimony, it necessarily follows that a witness has a constitutional right to testify at those trials.<sup>443</sup> The government has the duty to protect its citizens' right

right freely, and to protect him from violence while so doing, or on account of so doing.").

438. *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 603 (Cal. 1997) (quoting MONTESQUIEU, *THE SPIRIT OF THE LAWS* 157 (1889)).

439. *Quarles*, 158 U.S. at 535.

It is the duty and the right, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States. It is the right, as well as the duty, of every citizen . . . to act as part of the *posse comitatus* in upholding the laws of his country.

*Id.*; see also *Brown v. Walker*, 161 U.S. 591, 600 (1896); *Roviaro v. United States*, 353 U.S. 53, 59 (1957).

440. *Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961) ("Every citizen of course owes to his society the duty of giving testimony to aid in the enforcement of the law."); see also *Brown*, 161 U.S. at 600.

441. See CAL. PENAL CODE § 881 (West 1985 & Supp. 2002); *id.* § 1332 (West 1982 & Supp. 2002).

442. *Quarles*, 158 U.S. at 535–36.

443. See *United States v. Thevis*, 665 F.2d 616, 626 (5th Cir. 1982) ("We conclude, therefore, that *Quarles* implicitly overruled *Sanges*, and the Supreme Court's reasoning controls this case. Thus we hold that the right to testify at trial is one secured by the Constitution . . .").

to testify and to guard against any interference with this right by violence or intimidation.<sup>444</sup>

Government's duty to protect witnesses in criminal prosecutions arises for several reasons. First, acts of violence and threats of violence are not protected by the Constitution.<sup>445</sup> Second, fear for one's own safety or the safety of his family does not legally excuse a witness from his duty to testify.<sup>446</sup> Third, it would be unconscionable for government to impose duties and obligations on its citizenry, exposing them to the possibility of harm or danger, and then fail to assist them. Finally, individuals who perform their civic duty benefit society and, in turn, have a right to society's protection.<sup>447</sup> Even prisoners in custody have a constitutional right to be protected against violence committed against them while in custody, and government has a corresponding duty to protect them against assault or injury.<sup>448</sup>

In summary, witnesses have a constitutional right to report whatever knowledge they have of criminal activity to law enforcement, to assist with its prosecution, and to testify at trial. An accused has a constitutional right to confront his accusers and have them testify in court before the trier of fact. When an accused threatens or attacks a witness, he has not only waived this right, but has violated the constitutional rights of that witness in an attempt to obtain an advantage for himself. Thus, he has committed another crime—a violation of that witness's rights. He has also impliedly verified the witness's prospective testimony else the attack or threat would make no sense.

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444. See *Quarles*, 158 U.S. at 536 (“[I]t is the duty of that government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing.” (quoting *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884))); see also *Piemonte*, 367 U.S. at 559 n.2 (“Every citizen of course owes to his society the duty of giving testimony to aid in the enforcement of the law . . . . The Government of course has an obligation to protect its citizens from harm.” (citations omitted)).

445. *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993); *Roberts v. Jaycees*, 468 U.S. 609, 628 (1984).

446. *Piemonte*, 367 U.S. at 559 n.2 (“Neither before the Court of Appeals nor here was fear for himself or his family urged by Piemonte as a valid excuse from testifying. Nor would this be a legal excuse. Every citizen of course owes to his society the duty of giving testimony to aid in the enforcement of the law.” (emphasis added)).

447. See *Ex Parte Yarbrough*, 110 U.S. 651, 662 (1884); *Quarles*, 158 U.S. at 536; see also 18 U.S.C. § 241 (2000) (making criminal a conspiracy “to injure, oppress, threaten, or intimidate [any citizen] in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . .”).

448. *Logan v. United States*, 144 U.S. 263, 284 (1892).

The United States, having the absolute right to hold such prisoners, have an equal duty to protect them, while so held, against assault or injury from any quarter. The existence of that duty on the part of the government necessarily implies a corresponding right of the prisoners to be so protected; and this right of the prisoners is a right secured to them by the Constitution . . . .

*Id.*



By virtue of the threat facing the witness, and the defendant's ability to have that threat realized, the witness under current law can be placed in a witness protection program.<sup>449</sup> That placement results in the loss of those constitutional rights granted to all citizens, such as freedom of association,<sup>450</sup> which includes the creation and sustenance of a family, marriage, educating and raising children, and cohabitation with one's relatives;<sup>451</sup> the right to life and liberty;<sup>452</sup> the right to freedom of personal choice in the matters of family life;<sup>453</sup> the right to freely travel; the right to establish one's home and move about at will;<sup>454</sup> the right to contract and engage in any of the common occupations of life; and the right to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>455</sup>

Loss of these rights are significant, especially to one who has not committed a wrong and who has performed his or her moral and civic duty. In reality, the stakes are as high, if not higher, for the threatened witness as for the accused. The accused in a noncapital case faces incarceration and loss of liberty. The witness, who is innocent of any crime, is facing the real possibility of loss of life to himself or herself or a loved one, and the loss of freedom to live his or her chosen life, associate with their friends and family, and work at his or her chosen profession.

Furthermore, a program's protection may be for a limited period of time. For example, placement in California's witness protection program is only for six months, with an outside limit of nine months if

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449. The *Alvarado* court acknowledged the serious nature and magnitude of the problem of witness intimidation, and that it is crucial for government to provide protection to those witnesses. Yet the court admitted that none of the procedures in place, including the witness protection program, can guarantee the safety of a witness, but only help to reduce the risks the witness faces. This is borne out by the fact that every day government forgoes prosecution in many cases where evidence essential to the defense would jeopardize a witness's life. *Alvarado v. Superior Court*, 5 P.3d 203, 222–23 (Cal. 2000).

450. See *Jaycees*, 468 U.S. at 617–19.

451. *Id.*

452. See *Logan*, 144 U.S. at 287; *People v. Olivas*, 551 P.2d 375, 384 (Cal. 1976).

453. *Runyon v. McCrary*, 427 U.S. 160, 176 (1976).

454. *Roberts v. Jaycees*, 468 U.S. 609, 617–20 (1984); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976); *Aptheker v. Secretary of State*, 378 U.S. 500, 505 (1969).

455. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1922); see also *Jaycees*, 468 U.S. at 622.

necessary.<sup>456</sup> That exposes the individual to retaliatory acts when the protection ends. It is important to remember the words of our Supreme Court, that “justice though due to the accused, is due to the accuser also.”<sup>457</sup>

The public has an interest in the fair administration of justice, the conviction of those who are guilty and the adjudication of criminal trials in a setting which promotes confidence in the adversary process.<sup>458</sup> The courts are charged with protecting the public interest by giving the prosecution a fair opportunity to prove its cases against those who have violated the law.<sup>459</sup> The public has an important interest that trials be fair and that they result in a just judgment.<sup>460</sup> One who jeopardizes these interests truly jeopardizes the very structure of society.

Although already stated, the following is worth repeating:

Society reaps enormous benefits when a witness’s testimony succeeds in getting a criminal off the street and placed behind bars. Society must be willing to pay for that benefit by affording necessary protection to both the witness *and* his family, for the threat of violence against a witness’s family will often silence the witness. Without a continuing and visible public commitment to such protection, it is unrealistic to expect citizens to come forward and provide information so critical to the successful operation of the criminal justice system. To the extent that government fails to meet this essential responsibility, it cedes control of our cities to the criminals.<sup>461</sup>

State legislatures as well recognize that all individuals have a right “to be secure and protected from fear, intimidation, and physical harm caused by the activities of violent groups and individuals.”<sup>462</sup> When confrontation becomes a problem because of a defendant’s action, logic dictates that the innocent person should not be the one who suffers. The Sixth Amendment is meant to protect the accused from overreaching by the government, not from his own misdeeds.<sup>463</sup> Therefore, when the witnesses’ rights, duties, and obligations are balanced against the defendant’s right of confrontation, the moral equation tips in favor of the witness.

The President’s Task Force on Victims of Crime found such a serious imbalance between the rights of crime victims and the rights of criminal defendants, that it proposed an amendment to the United States Constitution to provide crime victims with “the right to be present and to

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456. CAL. DEP’T OF JUSTICE, *supra* note 306, at 9.  
457. *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).  
458. *See United States v. Nobles*, 422 U.S. 225, 231 (1975).  
459. *Arizona v. Washington*, 434 U.S. 497, 505 (1949).  
460. *See Wade v. Hunter*, 336 U.S. 684, 689 (1948).  
461. *Wallace v. City of Los Angeles*, 12 Cal. Rptr. 2d 113, 127 (Ct. App. 1983).  
462. *See CAL. PENAL CODE* § 186.21 (West 1999); *id.* § 11410 (West 2000).  
463. *United States v. Carlson*, 547 F.2d 1346, 1357–58 (8th Cir. 1976).

be heard at all critical stages of judicial proceedings.”<sup>464</sup> Just recently, President Bush and other members of the government have also called for a “constitutional amendment to protect the rights of violent-crime victims” because “the 8 million victims of violent crime each year have too often had their rights ignored in the criminal justice system.”<sup>465</sup> The amendment was characterized as “the right thing to do” because “too often . . . the rights of these victims have been overlooked or ignored.”<sup>466</sup> Attorney General Ashcroft opined: “It is time—it is past time—to balance the scales of justice, to demand fairness and judicial integrity not just for the accused but for the aggrieved as well.”<sup>467</sup> As proposed, the amendment would have seven procedural rights for violent crime victims, including “*the right to have their safety considered.*”<sup>468</sup>

## VI. CONCLUSION

Waiver by misconduct should apply in cases of witness intimidation and witness attacks. Application of the doctrine is consistent with the principle that the right of cross-examination may be limited for reasons of public policy, witness safety, or because of the necessities of the case.<sup>469</sup> As shown, applying the waiver doctrine is equitable, promotive of several important public policies, and justified by the weighing of the rights of the witness against those of the defendant.<sup>470</sup>

Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. “The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall.” What is fair in one set of circumstances may be an act of tyranny in others.<sup>471</sup>

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464. Dean G. Kilpatrick et al., *The Rights of Crime Victims—Does Legal Protection Make a Difference?*, NAT’L INST. JUSTICE, Dec. 1998, at 1; see President’s Task Force on Victims of Crime Final Report, WASHINGTON, D.C. 114 (Dec. 1982).

465. Eric Lichtblau, *Victims’ Bill Gets Backing*, L.A. TIMES, Apr. 17, 2002, at A10.

466. *Id.*

467. *Id.*

468. *Id.* (emphasis added).

469. See *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Mattox v. United States*, 156 U.S. 237, 243 (1895).

470. See *Clark v. Ricketts*, 958 F.2d 851, 855 (9th Cir. 1992); *United States v. Fuentes*, 988 F. Supp. 861, 866 (E.D. Pa. 1997); *United States v. Varelli*, 407 F.2d 735, 750 (7th Cir. 1969).

471. *Snyder v. Massachusetts*, 291 U.S. 97, 116–17 (1934) (quoting *Ownbey v.*

When confrontation becomes impossible due to actions committed by the one who would assert that right, and would benefit thereby, logic dictates that the right has been waived.<sup>472</sup> Else, a defendant can, with impunity, threaten or attack a witness. If suppression of the witness's identification is deemed a confrontation violation, then the following scenarios result: the witness refuses to testify and the defendant achieves his purpose of preventing the admission of relevant, material, and crucial evidence before the trier of fact and the criminal prosecution is dismissed; or, he learns the identity of the witness which thus enables the initial threat to be executed; or, the witness testifies, enters a witness protection program for a limited time and forfeits his or her constitutional rights, including those the defendant has violated, and when out of the program is still subject to retaliatory attacks. In each scenario, the defendant benefits from his wrongful conduct and is allowed to misuse the very process of the court and adversary system put in place for his protection, for malicious ends and in violation of the dictates of *Reynolds*, *Mattox*, and *Diaz*.<sup>473</sup> This cannot and should not be the law.

The Court has consistently refused to set a fixed rule as to when disclosure is required.<sup>474</sup> Thus, it is appropriate to interpret *Smith* as not requiring disclosure of witness identity in all cases, and certainly not in the case of the threatened witness who does not have the credibility issues present in *Alvarado*.<sup>475</sup>

Furthermore, even though the *Smith* Court found that “when the credibility of a witness is in issue, the very starting point in ‘exposing falsehoods and bringing out the truth’ through cross-examination must necessarily be to ask the witness who he is and where he lives,”<sup>476</sup> *Smith* did not involve a threatened witness, and did involve a witness with credibility issues.<sup>477</sup> At trial, the prosecutor did not provide the Court with any reason which might have justified the refusal to provide the witness's name and address.<sup>478</sup> Nor did the *Smith* Court say that such

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Morgan, 256 U.S. 94, 110 (1921)).

472. See *United States v. Thevis*, 665 F.2d 616, 630 (5th Cir. 1982).

473. See *id.* (“To permit such subversion of a criminal prosecution . . . [would] make a mockery of the system of justice that the right was designed to protect.”).

474. See, e.g., *McCray v. Illinois*, 386 U.S. 300, 310–11 (1967); *Roviaro v. United States*, 353 U.S. 53, 62 (1957).

475. *United States v. Rangel*, 534 F.2d 147, 148 (9th Cir. 1976) (stating that *Smith* “does not establish a rigid rule of disclosure, but rather discusses disclosure against a background of factors weighing conversely such as personal safety of the witness”); see also *Siegfriedt v. Fair*, 982 F.2d 14, 17 (1st Cir. 1992); *United States v. Varella*, 692 F.2d 1352, 1355 (11th Cir. 1982).

476. *Smith v. Illinois*, 390 U.S. 129, 131 (1968).

477. *Id.* at 130.

478. *Id.* at 134 (White, J., concurring).

disclosure was required in all cases under all circumstances. In fact, the Court affirmed that a trial court has a duty to protect witnesses from certain questions,<sup>479</sup> including those which “endanger the personal safety of the witness.”<sup>480</sup>

The Court has often noted that exceptions to the Sixth Amendment privilege may be enlarged from time to time, as long as the exceptions are consistent with the spirit of the law.<sup>481</sup> The purpose of the Clause is the promotion of the integrity of the trial process and its truth seeking function, and the administration of justice. Waiver by misconduct is consistent with this aim, because it penalizes those who attempt to subvert the trial process and undermine the integrity of the criminal prosecution.

Furthermore, “cross-examination is not improperly curtailed if the [trier of fact] is in possession of facts sufficient to make a ‘discriminating appraisal’ of the particular witness’s credibility.”<sup>482</sup> As stated earlier, cross-examination is used to impeach credibility and expose witness bias, if any. “So long as a reasonably complete picture of the witness’s veracity, bias and motivation is developed,” appropriate boundaries of cross-examination may be set.<sup>483</sup> Certainly the prosecution can provide all necessary discovery relevant to the protected witness’s credibility to the defense without disclosing that witness’s identity.<sup>484</sup>

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479. *Smith*, 390 U.S. at 133.

480. *Id.* at 133–34 (White, J., concurring); *see also* *Clark v. Ricketts*, 958 F.2d 851, 855 (9th Cir. 1992); *Varella*, 692 F.2d at 1355 (“A well-recognized limitation on the right to cross-examine a witness occurs when a disclosure of the information sought would endanger the physical safety of the witness or his family.”); *United States v. Twomey*, 460 F.2d 400, 403 (7th Cir. 1972); *United States v. Ellis*, 468 F.2d 638, 639 (9th Cir. 1972); *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969) (“[W]here there is a threat to the life of the witness, the right of the defendant to have the witness’ true name, address and place of employment is not absolute.”).

481. *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934) (“The exceptions are not even static, but may be enlarged from time to time, if there is no material departure from the reason of the general rule.”).

482. *United States v. Sasso*, 59 F.2d 341, 347 (2d Cir. 1995).

483. *United States v. McLaughlin*, 957 F.2d 12, 17 (1st Cir. 1992).

484. This should not be interpreted to imply that defense counsel cannot be trusted with that information. Rather, it is life’s experience that dissemination of information occurs in many ways, deliberate and accidental. Many people have access to confidential information which is being transcribed, copied, or left on a desk. People other than a defense attorney have access to defense materials as a necessary part of the working process, such as investigators, paralegals, clerks, typists, and messengers. Thus, once the information is given out, it may accidentally arrive in the wrong hands.

If this is not an acceptable solution, then the trial court could appoint an independent attorney and investigator, who would be given the identification information and then create their own discovery on the credibility of that protected witness. That information would then be turned over to the defense team so that, at least, an added layer of protection would prevent disclosure of the witness's identity.

One judge said that we cannot expect jurors to take their chances on what might happen to them as a result of a guilty verdict.<sup>485</sup> Neither should witnesses be expected to take a chance on what might happen to them if they testify.

Principles of morality, culpability, and responsibility are the heart of criminal jurisprudence.<sup>486</sup> The Sixth Amendment was not intended and “does not stand as a shield to protect an accused from his own [misdeeds].”<sup>487</sup> Just as a defendant who murders a witness to prevent that witness from testifying ought not be permitted to invoke the right of confrontation to prohibit the use of the witness's hearsay statement,<sup>488</sup> a defendant should not be afforded the protection of the Clause if he makes the identification of a witness an invitation to murder. As one wise Justice stated, there is the danger that “if the Court does not temper its . . . logic, with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”<sup>489</sup>

To hold that the liberty of [individuals] . . . must be forfeited to preserve the illusion of freedom for those whose ill conduct is deleterious to the community as a whole is to ignore half the political promise of the Constitution and the whole of its sense. The freedom to leave one's house and move about at will, and to have a measure of personal security is “implicit in ‘the concept of ordered liberty’” enshrined in the history and basic constitutional documents of English-speaking people. Preserving the peace is the first duty of government, and it is for the protection of the community from predations of the idle, the contentious and the brutal that government was invented.<sup>490</sup>

Witness intimidation raises concern not just for the well being of the targeted individual, but for the entire judicial process. Those concerns justify a limitation of the defendant's rights where the government's obligation to maintain order in society is at stake.<sup>491</sup>

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485. *United States v. Thomas*, 757 F.2d 1359, 1364 (1985).

486. *See Morissette v. United States*, 342 U.S. 246, 250 n.4 (1951).

487. *United States v. Carlson*, 547 F.2d 1346, 1359 (8th Cir. 1976); *United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985); *see Diaz v. United States*, 223 U.S. 442, 458 (1912).

488. *See Carlson*, 547 F.2d at 1359.

489. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

490. *People ex rel. Gallo v. Acuna*, 928 P.2d 596, 618 (Cal. 1997) (citing *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949)).

491. *See Mattox v. United States*, 156 U.S. 237, 242–43 (1895); *Diaz v. United States*, 223 U.S. 442, 460 (1912); *Snyder v. Massachusetts*, 291 U.S. 97, 116–17, 122 (1934).

The beyond a reasonable doubt standard reflects the value society places on individual freedom and the immense importance it places on an individual's life and liberty.<sup>492</sup> Is it not also true that the same value, the same concern, and the same consideration should apply to the life and liberty of witnesses and victims, who willingly perform their civic duty, risk their lives, and assist in the apprehension and prosecution of criminal activities? Are not their lives and their right to freedom just as valuable, just as precious? And if not, why not?

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492. See *In re Winship*, 397 U.S. 358, 363 (1970).

VII. APPENDIX

CALIFORNIA WITNESS PROTECTION PROGRAM

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**Attachment 1 CALIFORNIA WITNESS PROTECTION PROGRAM  
Witness Advisement**

Per Section 14025, Title 7.5 of the California Penal Code, the *Witness Advisement* shall be in writing and shall specify the responsibilities of the protected person that establish the conditions for the CWPP.

District Attorney's Office: \_\_\_\_\_ Contract Number: \_\_\_\_\_  
Witness Name and I. D. Number: \_\_\_\_\_

The protected person/witness shall agree to all of the following:

I, \_\_\_\_\_, do hereby agree to do all of the below conditions while in the California  
(print name)  
Witness Protection Program.

- ▶ testify truthfully in and provide all necessary information to appropriate law enforcement officials concerning all criminal proceedings (\_\_\_\_ witness initials);
- ▶ obey all laws (\_\_\_\_ witness initials);
- ▶ take all necessary steps to avoid detection by others during the period of protection (\_\_\_\_ witness initials);
- ▶ comply with all legal obligations and civil judgments (\_\_\_\_ witness initials);
- ▶ cooperate with all reasonable requests from officials providing the protection (\_\_\_\_ witness initials);
- ▶ disclose all outstanding legal obligations, including those concerning child custody and visitation rights (\_\_\_\_ witness initials);
- ▶ disclose any probation or parole responsibilities (\_\_\_\_ witness initials); and
- ▶ regularly inform the appropriate district attorney's office or law enforcement designee of his/her activities and current address (\_\_\_\_ witness initials).
- ▶ Failure to comply with any of the above may be a condition for termination from the program (\_\_\_\_ witness initials).

\_\_\_\_\_  
Witness (Signature) \_\_\_\_\_  
Date

I have explained each of the above conditions to the witness, and he/she has acknowledged and agreed to all of the conditions.

\_\_\_\_\_  
District Attorney Designee (Signature) \_\_\_\_\_  
Date

CWPP 3 (12/99)



CALIFORNIA WITNESS PROTECTION PROGRAM

**Attachment 2 CALIFORNIA WITNESS PROTECTION PROGRAM APPLICATION**

STATE OF CALIFORNIA	Mail to:	California Department of Justice
DEPARTMENT OF JUSTICE		California Bureau of Investigation/CWPP
CALIFORNIA WITNESS PROTECTION PROGRAM		P.O. Box 163029
APPLICATION		Sacramento, CA 95816-3029
		Attn: CWPP Program Analyst

Date: \_\_\_\_\_

**I. REQUESTING DISTRICT ATTORNEY'S OFFICE/WITNESS COORDINATOR**

District Attorney's Office	District Attorney Representative
Office:	Name/Title:
Business Address:	Address:
Phone #:	Phone #:
Agency Case #:	Investigating Officer:

**II. CASE INFORMATION**

Briefly describe the case in which the witness is testifying, and explain how it constitutes a gang-related crime, organized crime, narcotic trafficking crime, or some other crime that creates a high degree of risk to the witness. If possible, attach the crime report. If more room is necessary, please type on additional page and attach.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Has a complaint or indictment been filed, or does the submitting agency intend to seek a complaint or indictment?  
Yes  No

Court Case #: \_\_\_\_\_ Case Name: \_\_\_\_\_

Defendants Being Prosecuted	DOB	CII	Charges Filed	Custody Yes/No

**III. THREAT INFORMATION**

Articulate the credible evidence of a substantial danger the witness may suffer due to intimidation or retaliatory violence.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**IV. WITNESS INFORMATION**

NAME (1)		NAME (2)	
AKA		AKA	
DOB		DOB	
CII		CII	
CDL		CDL	
List family, friends, or associates who will also be protected:			
<b>NAME</b>		<b>DOB</b>	<b>RELATIONSHIP TO WITNESS</b>

**V. WITNESS ASSISTANCE NEEDED**

Period of time assistance needed (six-month limit): Beginning date: \_\_\_\_\_ Ending date: \_\_\_\_\_

<u>Essential Expenses Requested:</u>		<u>Financial Assistance Received by Witness</u>	
Relocation	:\$ _____/mo.	Salary	: \$ _____/mo.
Motel	:\$ _____/days for _____ days	Child Support	: \$ _____/mo.
Meals	:\$ _____/days for _____ days	Disability	: \$ _____/mo.
Incidentals	:\$ _____/days for _____ days	Welfare	: \$ _____/mo.
Apartment	:\$ _____/mo. for _____ mos.	Other (explain)	: \$ _____/mo.
Meals	:\$ _____/mo. for _____ mos.	Total Amount:	: \$ _____
Utilities	:\$ _____/mo. for _____ mos.		
Incidentals	:\$ _____/mo. for _____ mos.	Monthly Debts	: \$ _____/mo.
Deposits	:\$ _____		
Other (explain)	:\$ _____/mo. for _____ mos.		
Total Amount	:\$ _____		

Were other available funding sources utilized before applying to the CWPP? Yes  No   
 Is the witness currently receiving financial assistance from the State of California Board of Control, Victims of Crime Program? Yes  No  If yes, please explain. \_\_\_\_\_

\_\_\_\_\_  
 District Attorney Designee (e signature) Date

<input type="checkbox"/> Approved <input type="checkbox"/> Disapproved _____ CWPP Analyst _____ CWPP Manager	FOR CWPP PROGRAM USE ONLY _____ Date _____ Date
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CALIFORNIA WITNESS PROTECTION PROGRAM

**Attachment 3 CALIFORNIA WITNESS PROTECTION PROGRAM  
CWPP AGREEMENT  
(To be completed by CWPP Program Analyst Only)**

STATE OF CALIFORNIA  
DEPARTMENT OF JUSTICE  
CALIFORNIA WITNESS  
PROTECTION PROGRAM  
CWPP AGREEMENT FY 99/2000

Mail To: California Department of Justice  
California Bureau of Investigation/CWPP  
P.O. Box 163029  
Sacramento, CA 95816-3029  
Attn: CWPP Program Analyst

NEW	RENEWAL	AMENDMENT (NO. )	AGREEMENT NO.	AGENCY NO.
<b>District Attorney's Office</b>			<b>District Attorney Representative</b>	
Office Sacramento County District Attorney's Office			Name/Title Joseph Smith, Deputy District Attorney	
Address 1200 Town Square, Sacramento, CA			Telephone Number (916) 444-4444	
Law Enforcement Designee or Coordinator Betty Jones, DA Investigator			Telephone Number (916) 444-4455	

**DIGEST OF CONTRACT (REIMBURSABLE SERVICES PROVIDED BY THE CWPP)**

The California Witness Protection Program (CWPP), Title 7.5, Section 14021-14033, of the California Penal Code, will provide financial assistance to the Sacramento County District Attorney's Office for the protection of one witness identified as *Witness #* \_\_\_\_\_, endangered as a result of their involvement in a criminal matter.

Terms and Conditions: Reimbursement will be for relocation expenses, semi-permanent housing first and last months rent, rental and utility deposits, monthly rent, meals, utilities, and incidentals, in accordance with the *California Witness Protection Program Policy and Procedures Manual* governing witness protection services.

*(Each district attorney's office must maintain a record of original receipts for expenditures applied for the protection of witnesses).*

DOLLAR AMOUNT \$ \$ \_\_\_\_\_ (Chapter 50/99) PERIOD OF PERFORMANCE \_\_\_\_\_ TO \_\_\_\_\_

**REASON FOR CONTRACT (IDENTIFY SPECIFIC PROBLEM MAKING THE CONTRACT NECESSARY)**

The life of the witness is in danger due to their involvement in a criminal matter. CWPP funds will provide for the witness' continued protection until the case is concluded or financial assistance is no longer deemed necessary by the district attorney's office of as determined by the CWPP.

**DESCRIBE THE SERVICE WHICH WILL RESULT**

**WERE OTHER FUNDING SOURCES UTILIZED BEFORE APPLYING WITH THE CWPP?**

Yes  No

\_\_\_\_\_  
Authorized Signature of District Attorney's Office

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Program Analyst

\_\_\_\_\_  
Date

Attachment 4

CALIFORNIA WITNESS PROTECTION PROGRAM  
REIMBURSEMENT REQUEST LETTER  
(use district attorney's office letterhead)

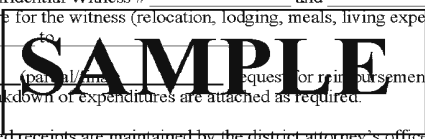
Date: \_\_\_\_\_

California Department of Justice  
California Bureau of Investigation/CWPP  
P.O. Box 163029  
Sacramento, CA 95816-3029  
Attn: CWPP Program Analyst

RE: CWPP Agreement # \_\_\_\_\_  
Witness Identification # \_\_\_\_\_

As provided in CWPP Agreement # \_\_\_\_\_ this office is requesting reimbursement of monies spent while protecting Confidential Witness # \_\_\_\_\_ and \_\_\_\_\_ family members. The expenses incurred were for the witness (relocation, lodging, meals, living expenses) during the period of \_\_\_\_\_ to \_\_\_\_\_.

This represents a \_\_\_\_\_ request for reimbursement in the amount of \$ \_\_\_\_\_. The breakdown of expenditures are attached as required.



I verify that all required receipts are maintained by the district attorney's office pertaining to the above specified expenses.

Please send the reimbursement monies to: \_\_\_\_\_  
District Attorney's Office  
\_\_\_\_\_  
Unit Address City  
\_\_\_\_\_  
State Zip Code

Signed: \_\_\_\_\_  
(title/office)

Mail to:  
California Department of Justice  
California Bureau of Investigation/CWPP  
P.O. Box 163029  
Sacramento, CA 95816-3029  
Attn: CWPP Analyst

CALIFORNIA WITNESS PROTECTION PROGRAM

Attachment 5 CALIFORNIA WITNESS PROTECTION PROGRAM  
LIST OF EXPENDITURES

CWPP Agreement #: \_\_\_\_\_ Date: \_\_\_\_\_  
Witness Identification #: \_\_\_\_\_

RELOCATION

Relocated on: \_\_\_\_\_  
Relocated by: \_\_\_\_\_  
If personal vehicle used, \_\_\_\_\_ x Miles x \$.31 Amount: \$ \_\_\_\_\_  
Moving Van/Trailer Expenses Amount: \$ \_\_\_\_\_  
Other Moving Expenses Amount: \$ \_\_\_\_\_  
Storage of personal possessions Amount: \$ \_\_\_\_\_  
Subtotal: \$ \_\_\_\_\_

LODGING AND MEALS

Local Protection (residence)

Mortgage Month: \_\_\_\_\_ Amount: \$ \_\_\_\_\_  
Meal Month: \_\_\_\_\_ Amount: \$ \_\_\_\_\_  
Incidentals: \_\_\_\_\_ Amount: \$ \_\_\_\_\_  
Subtotal: \$ \_\_\_\_\_

Temporary Lodging (hotel/motel)

Lodging Dates: \_\_\_\_\_ Amount: \$ \_\_\_\_\_  
Meal Dates: \_\_\_\_\_ Amount: \$ \_\_\_\_\_  
Incidental Dates: \_\_\_\_\_ Amount: \$ \_\_\_\_\_  
Subtotal: \$ \_\_\_\_\_

Semi-permanent Lodging (apartment/house)

Rent Month: \_\_\_\_\_ Amount: \$ \_\_\_\_\_  
Meal Month: \_\_\_\_\_ Amount: \$ \_\_\_\_\_  
Incidentals: \_\_\_\_\_ Amount: \$ \_\_\_\_\_  
Subtotal: \$ \_\_\_\_\_

Permanent Lodging (apartment/house)

Rent Month: \_\_\_\_\_ Amount: \$ \_\_\_\_\_  
Meal Month: \_\_\_\_\_ Amount: \$ \_\_\_\_\_  
Incidentals: \_\_\_\_\_ Amount: \$ \_\_\_\_\_  
Subtotal: \$ \_\_\_\_\_

Utilities (need prior CWPP approval)

Type of Service: \_\_\_\_\_ Amount: \$ \_\_\_\_\_  
Billing Dates: \_\_\_\_\_ Amount: \$ \_\_\_\_\_  
Utility Deposits: \_\_\_\_\_ Subtotal: \$ \_\_\_\_\_

**ARMED PROTECTION OR ESCORT**

Time Period from: \_\_\_\_\_ to \_\_\_\_\_

Number of protection and/or escort personnel \_\_\_\_\_

Overtime hours and costs devoted to armed protection or escort services \_\_\_\_\_ (OT Hrs) Amount \$ \_\_\_\_\_

Transportation costs devoted to armed protection or escort services Amount \$ \_\_\_\_\_

Per diem costs devoted to armed protection or escort services Amount \$ \_\_\_\_\_

Lodging costs devoted to armed protection or escort services Amount \$ \_\_\_\_\_

*(Please attach separate sheet for breakdown of expenses)* Subtotal Costs \$ \_\_\_\_\_

**ESTABLISHMENT OF NEW IDENTITY**

Include narrative of functions and costs related to the establishment of new identity

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Subtotal Costs \$ \_\_\_\_\_

**HEALTH CARE**

Include narrative of functions and costs related to health care

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Subtotal Costs \$ \_\_\_\_\_

**Grand Total \$ \_\_\_\_\_**

I verify that all required receipts are maintained by the district attorney's office pertaining to the above specified expenses.

\_\_\_\_\_  
Authorized Signature of District Attorney's Office

\_\_\_\_\_  
Date

↑ Approved ↑ Disapproved	FOR CWPP PROGRAM USE ONLY
_____ CWPP Primary Analyst	_____ Date

CALIFORNIA WITNESS PROTECTION PROGRAM

Attachment 6 CALIFORNIA WITNESS PROTECTION PROGRAM  
AMENDMENT REQUEST LETTER  
(Print on agency letterhead)

Date

California Department of Justice  
California Bureau of Investigation  
California Witness Protection Program  
P.O. Box 163029  
Sacramento, CA 95816-3029  
Attn: CWPP Program Analyst

RE: AMENDMENT REQUEST  
CWPP Agreement # \_\_\_\_\_  
Witness Identification # \_\_\_\_\_

We are requesting an Amendment to CWPP Agreement # \_\_\_\_\_ Wit # \_\_\_\_\_. The current agreement's period of performance is from \_\_\_\_\_ to \_\_\_\_\_.

We are requesting \$ \_\_\_\_\_ in additional funds be allocated to cover additional witness services to include \_\_\_\_\_. A breakdown of the amounts is attached. We are also requesting an extension in the *period of performance* to go from \_\_\_\_\_ to \_\_\_\_\_.

If you have any questions, please contact \_\_\_\_\_ at ( ) \_\_\_\_ - \_\_\_\_\_. Our fax number is ( ) \_\_\_\_ - \_\_\_\_\_.

Sincerely,

\_\_\_\_\_  
Authorized Signature of District Attorney's Office  
Representative's Title

**Attachment 7 CALIFORNIA WITNESS PROTECTION PROGRAM  
QUESTIONNAIRE**

The CWPP would appreciate your cooperation in completing this questionnaire. Your candid responses are extremely valuable in assessing the effectiveness of the CWPP.

District Attorney's Office: \_\_\_\_\_ CWPP Agreement #: \_\_\_\_\_

Witness Identification #: \_\_\_\_\_

Number of Family Members Assisted: \_\_\_\_\_

Relationship(s): \_\_\_\_\_

Results of Trial

Defendant Name	Convicted Of	Sentence

If case is still pending, anticipated trial date is: \_\_\_\_\_

Did defendant(s) plead guilty?	↑ Yes	No	↑
Did witness' testimony attribute to the guilty plea?	↑ Yes	No	↑
Could case go to trial without testimony of witness?	↑ Yes	No	↑
Would witness have testified without protection?	↑ Yes	No	↑
Was your request handled expeditiously?	↑ Yes	No	↑
Were any problems encountered?	↑ Yes	No	↑

Explain: \_\_\_\_\_  
\_\_\_\_\_

What additional services would you like to see provided by the CWPP?  
\_\_\_\_\_  
\_\_\_\_\_

Do you have any comments and/or suggestions concerning the CWPP, its policy, or procedures?  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
(signature/title)

\_\_\_\_\_  
(date)