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7 **IN THE SUPREME COURT**
8 **STATE OF ARIZONA**

9 IN THE MATTER OF:

10 PETITION TO ADD NEW RULE
11 804(b)(5) ARIZONA RULES OF
12 EVIDENCE

Supreme Court No. R-09-0009

**Comment of the State Bar of Arizona
Regarding Petition to Add New Rule
804(b)(5) to the Arizona Rules of
Evidence**

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15 The State Bar of Arizona agrees with the petitioner that the Arizona Rules of
16 Evidence should be amended to add a new Rule 804(b)(5) to expressly adopt the so-
17 called "forfeiture by wrongdoing" exception to the hearsay rule, and to re-number
18 current Rule 804(b)(5) as Rule 804(b)(6). The proposed rule tracks identically the
19 language of Rule 804(b)(6) of the Federal Rules of Evidence, which was adopted in
20 1997.

21 **The Need for Rule 804(b)(5)**

22 Rule 804(b) of the Arizona Rules of Evidence sets forth four express hearsay
23 exceptions where the declarant is unavailable as a witness, and also has a catch-all
24 exception. Proposed Rule 804(b)(5) would add a fifth express exception, where the
25 statement of the declarant is offered against a party that engaged or acquiesced in
26 wrongdoing that was intended to, and did, procure the unavailability of the declarant as

1 a witness. Although the petition describes the proposed rule as applying where “the
2 defendant” has engaged or acquiesced in the wrongdoing, the proposed Rule itself
3 makes no distinction between a defendant and any other party and is not limited to
4 criminal cases. With the understanding that the proposed rule applies to all proceedings
5 governed by the Arizona Rules of Evidence and to all parties, the State Bar agrees that it
6 should be adopted.

7 The United States Supreme Court has long recognized a “forfeiture by
8 wrongdoing” exception to the hearsay rule. See *Reynolds v. United States*, 98 U.S. 145,
9 158 (1878). The basis of the exception is the need to deal with wrongful conduct
10 “which strikes at the heart of the system of justice itself.” *United States v. Mastrangelo*,
11 693 F.2d 269, 273 (2d Cir. 1982), *cert. denied*, 467 U.S. 1204 (1984). It was against
12 this backdrop that the Federal Rules of Evidence were amended in 1997 to expressly
13 adopt this exception, which was denominated Rule 804(b)(6). The State Bar believes
14 that the adoption of that Rule was appropriate and furthered the interests of justice, and
15 that the adoption of a like rule in Arizona would further the same ends.

16 The State Bar also recognizes that in criminal cases the admissibility of all such
17 statements is also governed by the Confrontation Clause. The proposed rule, however,
18 does not purport to alter or override application of the Confrontation Clause or any other
19 prophylactic rule that would otherwise apply to the statement at issue; instead, the
20 proposed rule establishes that, if the conditions set forth therein exist, the offered
21 statement should not be barred from evidence on the basis of the hearsay rule. With that
22 understanding, the State Bar recommends adoption of Rule 804(b)(5) as proposed.

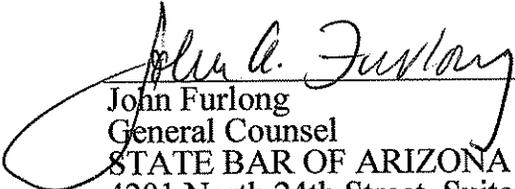
23 When the United States Supreme Court adopted Rule 804(b)(6) of the Federal
24 Rules of Evidence, the Evidence Advisory Committee, one of four bodies charged with
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1 oversight of the Federal Rules of Evidence,¹ commented on the new rule. This Court
2 should adopt a similar comment if it adopts the “forfeiture by wrongdoing” exception to
3 the hearsay rule. The comment would clarify that the wrongdoing need not consist of a
4 criminal act, that the rule applies to all parties (including the government), and that
5 preponderance of the evidence is the standard for determining whether “forfeiture by
6 wrongdoing” has occurred. The proposed comment, attached hereto as Exhibit A, is
7 patterned on the comment submitted by the Evidence Advisory Committee when Rule
8 804(b)(6) of the Federal Rules of Evidence was proposed/adopted.

9 **Conclusion**

10 The State Bar of Arizona respectfully requests that the Court adopt proposed
11 Rule 804(b)(5) of the Arizona Rules of Evidence. In addition to the request made by
12 Andrew P. Thomas, Maricopa County Attorney, the State Bar respectfully requests that
13 the comment attached hereto as Exhibit A be adopted to clarify the “forfeiture by
14 wrongdoing” exception to the hearsay rule.

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16 RESPECTFULLY SUBMITTED this 20th day of April 2009.

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18 
19 Joan Furlong
20 General Counsel
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22 Electronic copy filed with the
23 Clerk of the Supreme Court of Arizona
this 20th day of April 2009.

24 by: 
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26 ¹ The other bodies are Congress, the United States Supreme Court, and the Judicial Conference. P.R. Rice & W. Delker, FEDERAL RULES OF EVIDENCE ADVISORY COMMITTEE: A Short History of Too Little Consequence, 191 F.R.D. 187 (2000).

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Exhibit A

Comment to 2010 Amendment

Subsection (b)(5) addresses abhorrent behavior “which strikes at the heart of the system of justice itself.” *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982), cert. denied, 467 U.S. 1204 (1984). A party forfeits its 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. The wrongdoing need not consist of a criminal act. Subsection (b)(5) applies to all parties, including the government.

Whether a party has forfeited the right to object on hearsay grounds pursuant to subsection (b)(5) shall be determined by a preponderance of the evidence. The preponderance of the evidence standard has been adopted in light of the behavior the “forfeiture by wrongdoing” exception to the hearsay rule seeks to discourage.