

4-15-1976

People v. Rojas: The Expanding Concept of Unavailability

Brian Wade Uhl

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Constitutional Law Commons](#), and the [Evidence Commons](#)

Recommended Citation

Brian Wade Uhl *People v. Rojas: The Expanding Concept of Unavailability*, 3 Pepp. L. Rev. Iss. 2 (1976)
Available at: <https://digitalcommons.pepperdine.edu/plr/vol3/iss2/10>

This Note is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

People v. Rojas: The Expanding Concept of Unavailability

INTRODUCTION

California has recognized the subsequent unavailability of a witness as an adequate foundation for the introduction of his former testimony. This evidentiary rule arises from a statutory exception to the hearsay rule.¹ The American Law Institute has promulgated a uniform rule of evidence on this exception which has been approved by the United States Supreme Court² and applied by some federal courts.³ Although an assertable defense to the use of prior testimony of an unavailable witness might be a denial of the constitutional right of confrontation, such a result is obviated in California where the statutory exception is limited to situations in which the contestant, "had the right and opportunity to cross-examine" with a substantially similar motive in the former proceeding.⁴ Further, California case law has established that the

1. CAL. EVID. CODE § 1291 (West 1970) provides in pertinent part:

(a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: (1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

2. UNIFORM RULES OF EVIDENCE § 804 (West 1975) which the Supreme Court prescribed prior to adoption provides in pertinent part: "(a) Definition of unavailability. 'Unavailable 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 his statement; 2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; 3) testifies to a lack of memory of the subject matter . . . ; 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 his statement has been unable to procure his attendance (or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying." This section became part of the Federal Rules of Evidence, effective Jan. 1, 1976.

3. United States v. Brasco, 385 F. Supp. 964, 966 (S.D. N.Y. 1974).

4. CAL. EVID. CODE § 1291 (West 1970). For text see note 1, *supra*.

right of cross-examination and confrontation is fully satisfied when such right existed at the preliminary examination.⁵ Therefore, the focus of this note will be the potential hearsay objections to use of former testimony.

Perhaps the most difficult task the courts have encountered in applying this exception is determining what constitutes unavailability under the applicable statute. The trial court has enjoyed wide discretion in construing the concept of unavailability, since it is in the most advantageous position to view and balance the equities of the situation.⁶ The determination must be made whether the unavailability is so incurable as to necessitate admission of prior testimony against a contestant who might be unprepared for this contingency. Indeed, necessity is the underlying policy for this hearsay exception.⁷ So conceding, the California Court of Appeal in *People v. Gomez*,⁸ stated that a physical condition rendering a witness unavailable must make it substantially impossible, not merely inconvenient, for the court to obtain his present testimony. Although the severity of the condition was deemed the most important factor in deciding if necessity dictated receiving prior testimony, no ironclad rules were enunciated as to just what constituted sufficient infirmity for finding the witness unavailable. Rather, the issue was reserved for determination by the trial court: "However, we cannot say just what illness or infirmity must be shown or the degree of its severity, leaving that determination to a trial court's exercise of discretion."⁹

This wide latitude given to trial judges, while providing flexibility, serves to defeat achievement of any degree of uniformity. Although certain categories of unavailability, such as the subsequent death of the witness¹⁰ or the inability to secure his presence within the jurisdiction,¹¹ are invariably accepted, there exists

5. *People v. Hernandez*, 263 Cal. App. 2d 242, 252, 69 Cal. Rptr. 448, 454 (1968) and authority therein cited.

6. *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 675 (9th Cir. 1975). *Sanchez v. Baques & Sons Mortuaries*, 271 Cal. App. 2d 188, 193-94, 76 Cal. Rptr. 372, 375-76 (1969).

7. 5 WIGMORE, EVIDENCE 1402 (3d ed. 1974).

8. 26 Cal. App. 3d 225, 103 Cal. Rptr. 80 (1972).

9. *Id.* at 230, 103 Cal. Rptr. at 84.

10. *Howard v. State*, 49 Ala. App. 548, 274 S.2d 104 (1973); *People v. Burton*, 6 Ill. App. 3d 879, 286 N.E.2d 792 (1972).

11. 5 WIGMORE, EVIDENCE 1404 (3d ed. 1974).

little consensus among authorities as to when unavailability otherwise exists.¹² Perhaps sensing this, California enacted Section 240 of the Evidence Code¹³ delineating the categories of unavailability necessary for admission of prior testimony. However, the statute does not expressly deal with the effect of the witness' subsequent refusal to testify.

An early split of authority developed in the various state courts whether to recognize a witness' subsequent refusal to testify as rendering his present testimony unavailable.¹⁴ The Michigan court held that such a refusal constituted unavailability where the witness declined to testify due to a subsequent fear of self-incrimination even though he was granted immunity.¹⁵ In contrast, the Wisconsin courts¹⁶ held that under a grant of immunity the witness could be compelled to testify and, thus, could not be termed unavailable. Although the state could use the prior testimony for impeachment purposes,

[t]his, however, does not authorize the substitution by reading of that testimony for the testimony of the witness who was present in court. . . . Where a witness for the state becomes hostile and refuses voluntarily to give the testimony which he is capable of, it places a great hardship upon the prosecution. This, however, does not justify disregard of the rights [e.g., to have a fair trial free from prejudicial error] of the defendant in order to overcome the state's difficulty. The trial court had the duty and facilities to compel Russell to testify.¹⁷

The federal courts have also grappled with the effect of a subsequent refusal to testify. In *Mason v. United States*¹⁸ the defendant was charged with the importation and sale of heroin. Four wit-

12. *United States v. Brasco*, 385 F. Supp. 964, 965 (S.D.N.Y. 1974).

13. CAL. EVID. CODE § 240 (West 1970) provides in pertinent part:

(a) 'unavailable as a witness' means that the declarant is: 1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his statement is relevant; 2) Disqualified from testifying to the matter; 3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity; 4) Absent from the hearing and the court is unable to compel his attendance by its process; or 5) Absent from the hearing and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance by the court's process. (b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrong-doing of the proponent of his statement for the purpose of preventing the declarant from attending or testifying. (This section superceded and repealed Section 1870 of the Code of Civil Procedure.)

14. 29 AM. JUR. 2d, *Evidence* § 759 (1967).

15. *People v. Picket*, 339 Mich. 294, 63 N.W.2d 681 (1954). *Cert. denied* 349 U.S. 937 (1955).

16. *Pleau v. State*, 255 Wis. 362, 38 N.W.2d 496 (1949).

17. *Id.* at 366, 38 N.W.2d at 498.

18. 408 F.2d 903 (10th Cir. 1969); *cert. denied*, 400 U.S. 993 (1971).

nesses testified at the first trial but, after an appeal, refused to testify at the second trial on Fifth Amendment grounds. Even though a grant of immunity invalidated this constitutional assertion, three persisted in their refusal to testify again. After citing them for contempt, the court allowed the government to introduce their former testimony. Finding that the trial court had exhausted all available possibilities before finding the declarants unavailable, the reviewing court ruled "that the trial judge was not in error in permitting the use of the witness' testimony at the prior trial under the circumstances and the manner he did."¹⁹ *Mason* established a federal precedent which the federal district courts in the Tenth Circuit were bound to follow even if such precedent conflicted with state law.²⁰ It was later held that a witness' "silence in reliance, albeit misplaced, upon Fifth Amendment rights, makes him no less unavailable than death or absence from the country or physical inability to speak."²¹ *Mason* has been generally followed in subsequent circuit court decisions.²² Supporting the *Mason* trend is the Uniform Rules of Evidence which provides that a witness who "persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so," is unavailable.²³ Thus, the Uniform Rules explicitly provide for the silent witness whereas the California Evidence Code does not.

THE CALIFORNIA STATUTE

California enacted Section 240 of the Evidence Code hoping to avoid the conflicting decisions in this area. It prescribes when provisions of the Evidence Code,²⁴ the Penal Code,²⁵ and the

19. *Id.* at 906.

20. *United States v. Brasco*, 385 F. Supp. 964, 965-66 (S.D.N.Y. 1974).

21. *United States v. Mobley*, 421 F.2d 345, 350-51 (5th Cir. 1970).

22. *United States v. Singleton*, 460 F.2d 1148 (2d Cir. 1972); *United States v. Wilcox*, 450 F.2d 1131, 1138 (5th Cir. 1970); *United States v. Milano*, 443 F.2d 1022, 1029 (10th Cir. 1971); *United States v. Allen*, 409 F.2d 611, 613 (10th Cir. 1969).

23. *See, supra* note 2.

24. CAL. EVID. CODE § 1230 (declaration against interest), § 1251 (declarant's statement as to his previously-existing mental state), § 1291 (former testimony of declarant), § 1293 (former testimony of a nonparty), § 1310 (statements of declarant's own family history), § 1311 (family history of another), § 1323 (statement concerning boundary of land) (West 1970).

25. CAL. PENAL CODE § 1345 (deposition in a criminal trial), § 1362 (deposition taken under authority of commission) (West 1970).

Code of Civil Procedure²⁶ dealing with admission of former testimony of an unavailable witness apply. However, it does not explicitly provide for the situation involving an outright refusal to testify.

The Ninth Circuit Court of Appeals addressed itself to the application of Section 240 in *Rutledge v. Electric Hose and Rubber Co.*²⁷ The court refused to find government witnesses unavailable and thereby denied admission of their former trial transcripts by relying on the district court's wide discretion: "The record discloses that the district court took the unavailability status of the witnesses . . . on a one-to-one basis, and in each instance, found that Rutledge had not exercised 'reasonable diligence' within the meaning of Section 240(a)(5) of the California Evidence Code."²⁸ The trial court's methodology was not questioned or disapproved. Thus, while the criteria establishing unavailability are codified, substantial trial court discretion is acceptable to the appellate court.²⁹ Yet, once again the appellate level failed to provide standards with which to measure the scope of statutory unavailability. It was imperative that a court decide whether a non-privileged witness' refusal to testify would fall within the bounds of Section 240 so as to render him "unavailable." The California Supreme Court established the essential precedent in *People v. Rojas*.³⁰

THE CASE

Defendants Rojas and Ramirez were convicted of assault with a deadly weapon in two counts. An essential prosecution witness, Navarrette, was a co-passenger in the automobile driven by defendant Rojas. He testified at the preliminary hearing and at the first trial of defendants. After being granted immunity, Navarrette testified that he saw Ramirez actually firing a shot. However, after the jury was unable to render a verdict and a second trial was set, Navarrette refused to testify. In an *in camera* hearing Navarrette declared that he had been subjected to threats of bodily harm and that his family had suffered from the vandalism of its property. He further stated that he harbored great fear for his family's safety and therefore, intimidated by possible future danger, he felt compelled to refuse to testify. Despite being threatened with contempt

26. CAL. CODE OF CIV. PRO. § 2016(d)(3) (use of prior depositions in a civil trial) (West 1970).

27. 511 F.2d 668 (9th Cir. 1975).

28. *Id.* at 675.

29. *Id.*

30. 15 Cal. 3d 540, 542 P.2d 229, 125 Cal. Rptr. 357 (1975).

he remained silent; he was thereafter incarcerated. The trial court allowed his prior testimony to be read at the second trial, relying on two grounds: 1) His refusal to testify constituted an implied denial of his prior testimony and the latter could be admitted pursuant to Evidence Code Section 1235 as a prior inconsistent statement,³¹ and 2) His refusal to testify rendered him unavailable as a witness pursuant to Section 240 of the Evidence Code. The Supreme Court disagreed with the trial court's reliance on the former ground,³² but after disposing of a collateral issue³³ they considered the issue of Navarrette's unavailability.

UNAVAILABILITY

Since Navarrette was not absent or disqualified and his refusal was not privileged,³⁴ the reviewing Court concluded that only subdivision (a) (3) of Section 240 of the Evidence Code could possibly apply. This subdivision states, "unavailable as a witness means that the declarant is: . . . (3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity."³⁵ A close examination of subsection (3) allows it

31. CAL. EVID. CODE § 1235 (West 1970). The prior testimony could be used as substantive, as well as impeaching, evidence. *California v. Green*, 399 U.S. 149 (1970).

32. Defendants contended that Navarrette's refusal could not be construed as a prior inconsistent statement that would invoke section 1235 of the Evidence Code. The reviewing court agreed and ruled that the wording, "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing . . ." compelled the result that Navarrette's prior testimony could not be used when he did not testify at the present hearing where the admissibility question arose.

33. Rojas had contended that there was proof that the jury had not considered his individual guilt or innocence but, rather, had remained deadlocked on Ramirez's guilt alone. Rojas requested that he be allowed to enter a plea of "once in jeopardy" because the discharge of a jury without a verdict barred a retrial unless the defendant had consented or a legal necessity existed. CAL. PENAL CODE § 1140 (West 1970). This request was deemed without merit because the trial court could, and did, determine legal necessity based on reasonable probabilities. The defendants were so connected as to preclude a verdict against one without a verdict as to the other. Viewing all factors before it, and granted its sound discretion, there was no abuse of trial court discretion.

34. The trial court grant of immunity precluded a 5th Amendment refusal.

35. See, *supra* note 13.

to be segmented into two components. The first component requires the declarant to possess a specific status. He must be "dead" or "unable to attend or to testify." The second component demands that this status must be caused by one of the named conditions. The inability to obtain present testimony must be *because* of a present "physical or mental illness or infirmity." Logically, without establishing both of these components this limited subdivision should not be applied.

The Court dealt exclusively with the second component, the causation factor. On this point the state contended that, "the term 'mental infirmity' includes a mental state induced by fear which impels the witness to refuse to testify." The Court agreed and ruled that Navarrette's fear for safety constituted a mental infirmity within the meaning of Section 240(a)(3). They found Webster's definition of "infirmity"³⁶ applicable to this situation. This decision that extreme fear can constitute mental infirmity appears justified. However this satisfies only the second component, the causation factor, leading to the witness' status. The Court proceeded not only to find that Navarrette's fear constituted a mental infirmity but further found that he should be categorized as unavailable. It is interesting to note how they dealt with the first component, the declarant's present status.

The Court noted that this situation was one of first impression because Navarrette was not only present but both "physically and mentally *able to testify*" [emphasis added]. By making this latter observation the Court appears to have placed its application of the statute on weak ground. It seems to have ignored the requisite first component of the narrow subdivision, the declarant's present inability to testify. Unless the witness is first established to be dead or unable to testify, consideration of the cause of that status would appear to be premature. Granted, extreme fear can constitute a "mental infirmity" and thus satisfy the second statutory component. Yet the primary component, the witness' inability to testify, is equally important. Since the Court conceded availability it invalidated this primary component and apparently exceeded the scope of the statute. In all probability the Court was attempting to ascertain the intent of the legislature in enacting the statute. Possibly the use of the phrase "able to testify" was inadvertent and was not intended to disallow the admission of prior testimony in the type of factual situation present in *Rojas*. The resulting rule

36. "Infirmity: a defect of personality or weakness of the will." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966).

elevates substance over form and significantly extends the statute's application to this recurrent situation.

In applying Section 240 the Court noted that the statute was designed to retain the prior recognized situations of unavailability, as well as to expand that definition. Indeed, the Legislative Comment to Section 1291 of the Evidence Code, which allows prior testimony to be used where the declarant is presently unavailable, and which was applied, indicated an attempt to broaden the scope of unavailability: "Section 1291 will also permit a broader range of hearsay to be introduced against the defendant in a criminal action than has been permitted under Penal Code Section 686."³⁷ In interpreting the legislative intent, the Court drew an analogy between a person asserting a legitimate privilege and one who harbors a legitimate fear for his safety. Noting that the former is expressly delineated by statute while the latter is not, the Court discussed the maxim *expressio unius est exclusio alterius*.³⁸ It concluded that the maxim would give way where it would operate contrary to the legislative intent. The Court interpreted the legislative intent to include non-privileged refusals to testify within the definition of unavailability.

REQUIREMENT OF CORROBORATION

The only case which the California Supreme Court noted in reference to a mental illness or infirmity was *People v. Gomez*.³⁹ There a minor female complainant testified at the preliminary hearing but not at the trial. Two staff psychiatrists at the state hospital where she was confined testified that her appearance in court would be traumatic and extremely detrimental to her mental recovery. The Court allowed her preliminary hearing testimony to be read after finding her unavailable.

The *Gomez* Court distinguished the authorities cited by defendant from the cases cited by the state. In *People v. Bojorquez*⁴⁰ the

37. LEGISLATIVE COMMITTEE COMMENT § 1291 (Assembly Journal, April 6, 1965). CAL. PENAL CODE § 686 allows introduction of hearsay to the extent allowable under state law to qualify as an exception to the criminal defendant's right of confrontation.

38. "Expression of one thing is the exclusion of another."

39. 26 Cal. App. 3d 225, 103 Cal. Rptr. 80 (1972).

40. 55 Cal. 463 (1880). Defendant had used this authority.

witness was found to be available since the only witness testifying was the under-sheriff who testified that the witness was "unwell and not able to leave his room"⁴¹ for the trial. In *People v. Rine-Smith*⁴² the trial court was reversed when it based its finding of unavailability on a police officer's testimony that the witness was too ill to attend the trial. Both of these case decisions rested on the lack of independent expert testimony as to the infirmity. In one of the more controlling cases, *People v. Hernandez*,⁴³ a licensed physician testified that declarant had been in an accident, was expected to be unconscious indefinitely, and was certain to sustain permanent brain damage. Similarly, in *People v. King*⁴⁴ a licensed doctor testified that declarant was unavailable due to cerebral thrombosis. In the latter two cases the trial court was held justified in basing its finding of unavailability on medical testimony. It can be seen that the *Gomez* Court placed great emphasis on the weight of independent corroborative evidence.

The *Rojas* Court failed to mention this important distinction. *Gomez* intimated that independent expert testimony was crucial in corroborating a claim of unavailability. In *Rojas* the only evidence adduced in this respect was Navarrette's own statement. His opinion certainly lacked the weight of an independent witness' assessment. A strong burden of proof as to unavailability should properly be placed on the party seeking the admission of the prior testimony. The appellate ruling in *Sanchez v. Bagues & Sons Mortuaries*⁴⁵ sustained this position. When faced with a situation markedly similar to *Rojas*⁴⁶ the court stated:

Unavailability of the witness was a preliminary fact to be established to the satisfaction of the trial court by the proponent of the evidence There was no testimony of a doctor or a nurse that the witness could not appear in court. . . . [I]t was incumbent upon counsel to establish the unavailability of the witness to the satisfaction of the court. . . . Houghten's deposition testimony concerning his disability could not be considered at all on the question of the disability as of the time of trial, because to do so would be 'pulling yourself up by your own bootstraps,'⁴⁷

In approving the exercise of the lower courts' discretion, both the *Sanchez* Court and the *Gomez* Court were notably impressed

41. *Id.* at 464.

42. 40 Cal. App. 2d 786, 105 P.2d 1021 (1940). Defendant had relied on this also.

43. *People v. Hernandez*, 263 Cal. App. 2d 242, 69 Cal. Rptr. 448 (1968).

44. *People v. King*, 269 Cal. App. 2d 40, 74 Cal. Rptr. 679 (1969).

45. 271 Cal. App. 2d 188, 76 Cal. Rptr. 372 (1969).

46. A deponent had sought to establish his unavailability by his own statements regarding his physical condition.

47. 271 Cal. App. 2d 188, 193-94, 76 Cal. Rptr. 372, 375 (1969).

with reliance on independent corroborative evidence before unavailability was established. Similarly, the *Sanchez* Court specifically frowned on the proponent's attempts to sustain his burden of proof by his own testimony. Although no explicit guidelines were enunciated in *Sanchez* that require independent corroboration, the appellate court characterized the proponent's attempts to proceed without it as "pulling yourself up by your own bootstraps."

The very crucial point which the *Gomez* and *Sanchez* cases turned upon was ignored in *Rojas*. The propriety of the prosecution's use of the prior testimony of Navarrette based only on his assertion of his own mental infirmity was not questioned. Perhaps the state in *Rojas* was "pulling itself up by its own bootstraps" in failing to present some independent evidence to substantiate Navarrette's claim.

The reliance on Navarrette's preliminary examination testimony was possibly prejudicial to *Rojas*. The preliminary examination is limited to the issue of probable cause and ordinarily neither party discloses the full merits of his case. If only one party anticipates a witness' subsequent silence he will elicit as much testimony as possible while the disadvantaged party may defer detailed cross-examination until the trial date. Perhaps the state in *Rojas* used its foresight of future peer group pressure on Navarrette to elicit incriminating testimony at the earliest opportunity. Obviously it had the facilities of law enforcement at its disposal making possible early knowledge of Navarrette's subsequent silence. Apparently defendant lacked that foresight because he was the one contesting the admission of the preliminary hearing transcripts. If defense counsel had anticipated this key witness' subsequent silence he could have used the preliminary examination as a "full-dress hearing" and conducted a comprehensive cross-examination that would have rendered objection to use of that transcript unnecessary. Requiring a strong burden of proof from the party seeking admission of the unavailable witness' testimony is crucial in minimizing the potential prejudice in this situation of a self-proclaimed "unavailable" witness. It is unjust to the unprepared party to allow this burden to be sustained by solely relying upon the witness' own testimony to establish statutory unavailability. The better solution is the requirement of independent corroboration.

As discussed previously, the *Gomez* Court and *Sanchez* Court

approved the use of independent corroborative evidence to demonstrate both the existence of a mental or physical infirmity and the complete lack of alternative methods to render the witness able to testify. The Court in *Rojas* failed to require any showing by independent corroboration that there was no remedy available to ameliorate Navarrette's fear, either by implementation of police protection or relocation of the witness into a different environment. Although the California Supreme Court was not bound by *Gomez* it was the only case relied upon and approved in *Rojas*. Further, *Gomez* relied on the *Sanchez* reasoning regarding independent corroborative evidence. It would seem that by once again placing emphasis on trial court discretion and failing to establish a requirement beyond the mere assertion of a declarant, the California Supreme Court has departed from the sensible trend that the appellate levels had established.

BALANCING THE INTERESTS

Finally, the *Rojas* Court rationalized that undesirable consequences would result if a witness' testimony could be rendered unavailable by threats. Yet, the Wisconsin rationale seems equally palpable: "This, however, does not justify disregard of the rights of defendant in order to overcome the state's difficulty."⁴⁸ It appears that any defendant could be prejudiced by a witness' subsequent refusal to testify. For, although the letter of the constitutional right of confrontation would be satisfied, certainly the spirit would be violated if large-scale refusals of material witnesses were utilized in a routine manner. Although the difference in scope between a preliminary hearing and a trial is not such as to destroy the right of confrontation if preliminary cross-examination was available,⁴⁹ it is certain that strategy would be altered if it became apparent that a witness would subsequently refuse to testify.

Viewing the situation from this perspective, the possible inequities on both sides seem equal. Undoubtedly, the *Rojas* Court placed great reliance on subdivision (b) of Section 240⁵⁰ which prevents an unavailability finding if it is procured by the proponent of the prior testimony. This safeguard is deemed adequate by the Court and it was found inapplicable in *Rojas*. This decision should provide notice to all litigants who might suffer from the possibility of a subsequent reluctant witness to place greater emphasis on

48. *Pleau v. State*, 255 Wis. 362, 366, 38 N.W.2d 496, 498 (1949).

49. *People v. King*, 269 Cal. App. 2d 40, 46, 74 Cal. Rptr. 679, 685 (1969).

50. CAL. EVID. CODE § 240 (West 1970). For text see, *supra* note 13.

primary proceedings so as to mitigate the possibility of future prejudice.

CONCLUSION

Because Section 240(a) (3) might not literally apply in light of the Court's threshold finding that Navarette was physically able to testify, *Rojas* seems to be a judicially-enacted extension of this hearsay exception. The "exception" now specifically includes non-privileged refusals to testify. Be it extension or legislative interpretation, the decision provides much-needed uniformity to this gray area. Further, it follows the federal trend as enunciated in Section 804 of the Uniform Rules of Evidence which explicitly provides for such a situation.⁵¹ Section 240 was intended to "substitute a uniform standard for the varying standards of unavailability . . ." ⁵² but, as explained, it left an important gap that frequently appeared. The California Supreme Court filled that gap in *Rojas*.

One foreseeable result of the decision concerns the difficulty encountered in responding to a mental or emotional claim of justifiable fear. How can an adversary defeat a witness' claim of fear? It is conceivable that he might be forced to contend with deliberate subterfuge which only appears after the possibility of adequate cross-examination at the preliminary hearing had been waived until the actual trial. The only remedy lies in proving the unavailability status was procured by the proponent. However, the extent to which a court would be influenced by allegations of fraud and the amount of proof required remains to be seen.

A possible new direction could be a legislative enactment of a statute similar to Section 804(a) (2) of the Uniform Rules of Evidence which encompasses the situation.⁵³ It would be desirable to add a requirement of independent corroborating evidence to support a claim of unavailability. Although expert testimony might be difficult to obtain in certain circumstances, it would not be burdensome to require the trial courts to exact a stricter burden of proof than the declarant's statements alone. The unavail-

51. TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE (Article VIII *Hearsay Evidence*), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES APPENDIX at 411, note 7 (1964).

52. See, *supra* note 2.

53. For text see, *supra* note 2.

able witness' statements of fear could be corroborated by either testimony of other witnesses or by circumstantial evidence. This would impose no undue burden on the truly unavailable witness yet would circumvent ungrounded claims by a reluctant declarant. The judicial dedication to basic rights of a litigant or defendant should require no less. A good faith showing of justified fear should be required before an unavailable status is established.

Yet, California courts now possess a uniform standard on the issue of unavailability caused by a witness' non-privileged refusal to testify. It has been established that not only can fear constitute mental infirmity, it may render him "unavailable" within the meaning of Section 240 of the Evidence Code. It should be interesting to note the spectrum of cases which will appear delineating the outer bounds of what degree of fear is required to lead to a finding of a mental infirmity. But for now the door has been opened.

Brian Wade Uhl