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CHIPPING AWAY AT PROPOSITION 115

*Joan Comparet-Cassani**

I. INTRODUCTION

In June 1990 Proposition 115 amended section 872(b) of the California Penal Code.¹ As amended, the statute provides a new exception to the hearsay rule: At a preliminary hearing "the finding of probable cause may be based in whole or in part upon the sworn testimony of a law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted."²

Recently, Division Five of the First District Court of Appeal in *Nienhouse v. Superior Court*³ held that the term "declarant" as used in section 872(b) includes a defendant.⁴ In a unanimous decision the court held that the defense may introduce into evidence a defendant's exculpatory out-of-court statements from a law enforcement officer, either on cross-examination or as its own witness on direct examination, if the requirements of section 866⁵ are

* Judge, Long Beach Municipal Court.

1. See CAL. PENAL CODE § 872(b) (West Supp. 1996). This statutory provision was enabled by the addition of Section 30(b) to Article I of the California Constitution, which expressly permits the admission of hearsay at preliminary hearings: "In order to protect victims and witnesses in criminal cases, hearsay evidence shall be admissible at preliminary hearings, as prescribed by the Legislature or by the People through the initiative process." CAL. CONST. art. I, § 30, cl. b.

2. California Penal Code section 872(b) provides:

Notwithstanding Section 1200 of the Evidence Code, the finding of probable cause may be based in whole or in part upon the sworn testimony of a law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted. Any law enforcement officer testifying as to hearsay statements shall either have five years of law enforcement experience or have completed a training course certified by the Commission on Peace Officer Standards and Training which includes training in the investigation and reporting of cases and testifying at preliminary hearings.

CAL. PENAL CODE § 872(b).

3. 42 Cal. App. 4th 83, 49 Cal. Rptr. 2d 573 (1996).

4. See *id.* at 91-92, 49 Cal. Rptr. 2d at 578.

5. Penal Code section 866(a) directs the magistrate to require an offer of proof from the defense when the People so request:

met.⁶

As will be shown, the court's conclusion conflicts with the intent and goals of Proposition 115 by expanding the rights of defendants, conflicting with the law on the admissibility of a defendant's hearsay statements, violating the rules of statutory construction, and rendering a holding that creates problems unaddressed and unresolved by the court.

II. STATUTORY INTERPRETATION

The *Nienhouse* court correctly begins its analysis with the cardinal rule of statutory construction, which is "to ascertain the intent of the lawmakers so as to effectuate the purpose of the law."⁷ But just as quickly, indeed in the very next paragraph, the court abandons that endeavor and concludes that the term "declarant" as used in this section includes a defendant because there is no restrictive language in the statute precluding this interpretation.⁸

This analysis is simply incorrect. "When used in a statute, words must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear."⁹ Thus, a statute must be interpreted in light of the legislative purpose and design¹⁰ and should not be interpreted to frustrate that intent.¹¹

When the examination of witnesses on the part of the people is closed, any * * * witness the defendant may produce * * * shall be sworn and examined.

Upon the request of the prosecuting attorney, the magistrate shall require an offer of proof from the defense as to the testimony expected from the witness. The magistrate shall not permit the testimony of any defense witness unless the offer of proof discloses to the satisfaction of the magistrate, in his or her sound discretion, that the testimony of that witness, if believed, would be reasonably likely to establish an affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness.

CAL. PENAL CODE § 866(a).

6. See *Nienhouse*, 42 Cal. App. 4th at 91-92, 49 Cal. Rptr. 2d at 578.

7. *Id.* at 89, 49 Cal. Rptr. 2d at 576; see also *In re Lance W.*, 37 Cal. 3d 873, 889, 694 P.2d 744, 754, 210 Cal. Rptr. 631, 641 (1985) (holding that the intent of the enacting body is the paramount consideration in construing constitutional and statutory provisions, whether enacted by the legislature or by initiative).

8. See *Nienhouse*, 42 Cal. App. 4th at 89-90, 49 Cal. Rptr. 2d at 577.

9. *Walker v. Superior Court*, 47 Cal. 3d 112, 124, 763 P.2d 852, 858, 253 Cal. Rptr. 1, 7-8 (1988).

10. See *People v. Woodhead*, 43 Cal. 3d 1002, 1007, 741 P.2d 154, 156, 239 Cal. Rptr. 656, 658 (1987).

11. See *People v. Navarro*, 7 Cal. 3d 248, 273, 497 P.2d 481, 499, 102 Cal. Rptr. 137, 155 (1972).

“Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent.”¹²

Unlike most legislation, the initiative clearly sets forth the goals of the People in enacting Proposition 115.¹³ The objectives include “comprehensive reforms [in the] criminal justice system,”¹⁴ a determination “to restore balance to our criminal justice system, [and] to create a system in which justice is swift and fair, and . . . in which crime victims and witnesses are treated with care and respect.”¹⁵

Frustration with crime in the streets, schools, homes, and neighborhoods, and the perception that court decisions have favored and expanded the rights of defendants at the expense of victims’ rights, are the historical factors that motivated the proponents of Proposition 115.¹⁶

The official voter’s pamphlet containing Proposition 115 included a summary of the initiative, the legislative analyst’s analysis, the arguments in favor and against the initiative, and the respective rebuttal arguments.¹⁷ Ballot arguments in favor of Proposition 115 reflected frustration and dissatisfaction with the state of the law and the treatment afforded victims and witnesses of crime.¹⁸ For example, Proposition 115 proponents argued that “[f]or years, politicians in Sacramento have refused to enact tougher laws, like those in other states.”¹⁹ The pamphlet also included the claim that “defense lawyers love delays. Witnesses die or their memories fade. Busy people avoid drawn-out jury service. Prolonged trials go haywire. With judges and prosecutors frus-

12. *Dyna-Med, Inc. v. Fair Employment & Hous. Comm’n*, 43 Cal. 3d 1379, 1387, 743 P.2d 1323, 1327, 241 Cal. Rptr. 67, 70 (1987).

13. *See* 1990 Cal. Stat. A-243, § 1.

14. *Id.* § 1(a).

15. *Id.* § 1(c).

16. *See id.* § 1(a), (c); *Raven v. Deukmejian*, 52 Cal. 3d 336, 348, 801 P.2d 1077, 1084, 276 Cal. Rptr. 326, 333 (1990) (stating that the purpose of Proposition 115 was to nullify California Supreme Court decisions that unnecessarily expanded the rights of accused criminals).

17. *See* CALIFORNIA BALLOT PAMPHLET, PRIMARY ELECTION, June 5, 1990, at 32-35. [hereinafter *BALLOT PAMPHLET*].

18. *See id.* at 34. “Ballot summaries and arguments are accepted sources from which to ascertain the voters’ intent and understanding of initiative measures.” *In re Lance W.*, 37 Cal. 3d 873, 888 n.8, 694 P.2d 744, 753 n.8, 210 Cal. Rptr. 631, 640 n.8 (1985).

19. *BALLOT PAMPHLET*, *supra* note 17, at 34.

trated by delay, plea bargaining runs rampant.”²⁰ The argument continued that Proposition 115 had “the support of thousands of innocent victims of crime who have been the objects of violence, or have lost loved ones, and been dragged through the courts for years by the delaying tactics of highly paid lawyers and an unfeeling legal bureaucracy.”²¹

Proposition 115 was crafted in response to the frustration and dissatisfaction that is also reflected in the proposition’s preamble. Section 1(a) of Proposition 115 recites that “[w]e the people of the State of California hereby find that the rights of crime victims are too often ignored by our courts and by our State Legislature.”²² Section 4 of the initiative—codified in Article I of the California Constitution—provides that “[i]n a criminal case, the People of the State of California have the right to due process of law and to a speedy and public trial.”²³ Finally, section 5 of the initiative, also added to Article I of the California Constitution, states that “[i]n order to protect victims and witnesses in criminal cases, hearsay evidence shall be admissible at preliminary hearings, as prescribed by the Legislature or by the people through the initiative process.”²⁴

With this background in mind, it is clear that the purpose of permitting hearsay evidence at preliminary hearings is to protect victims and witnesses. Sections 1(a) and (c) and section 5 reiterate that the stated concern of the initiative is the safety and protection of crime victims, witnesses, and their rights.²⁵ One obvious protection that hearsay preliminary hearings afford crime victims and witnesses is that they do not have to testify at both the preliminary hearing and again at trial.²⁶ It also forecloses numerous trips to the courthouse in anticipation of hearings often postponed. It protects child victims from the inherent embarrassment of repeating horrors they have suffered. Thus, section 872(b) was drafted with the intent to protect victims and witnesses in criminal cases. This intent mandates that the term “declarant,” as used in this section,

20. *Id.*

21. *Id.*

22. 1990 Cal. Stat. A-243, § 1(a).

23. *Id.* § 4 (codified at CAL. CONST. art. I, § 29).

24. *Id.* § 5 (codified at CAL. CONST. art. I, § 30).

25. *See id.* §§ 1(a), (c), 5.

26. *See Whitman v. Superior Court*, 54 Cal. 3d 1063, 1088, 820 P.2d 262, 277, 2 Cal. Rptr. 2d 160, 175 (1991) (Kennard, J., concurring and dissenting); *Martin v. Superior Court*, 230 Cal. App. 3d 1192, 1198-99, 281 Cal. Rptr. 682, 686 (1991).

should not be interpreted to include the exculpatory hearsay statements of a criminal defendant.

Nevertheless, *Nienhouse* completely overlooks this historical landscape of Proposition 115 and provides an expansive definition of "declarant."²⁷ Basically, the court's argument has three parts:

- (1) the terms of the statute do not prevent including a defendant within the meaning of the term "declarant";
- (2) this conclusion is consistent with the expansive use of declarant adopted by the supreme court in *Whitman v. Superior Court*²⁸ and,
- (3) any other conclusion would be unfair and lack balance in the criminal process under a due process argument.²⁹

The first argument fails because it ignores the basic rule of statutory interpretation that a statute must be construed in light of the legislative purpose and design.³⁰ The second argument is unpersuasive since the California Supreme Court in *Whitman* did not discuss this issue and, thus, is not authority for the court's conclusion in *Nienhouse*.³¹ Finally, the third argument conflicts with the express finding of the California Supreme Court in *Whitman* that the statute is not fundamentally unfair in providing a limited exception to the general hearsay exclusionary rule.³²

Thus, the holding in *Nienhouse* violates one of the basic tenets of statutory construction: A statute should not be interpreted to frustrate the change intended by an amendment but rather to ascertain and effectuate legislative intent.³³ Interpreting "declarant" to include a defendant ignores the intent and goal of Proposition 115 and violates the canons of statutory construction.

A. Evidence Code Section 1220 and Other Conflicts

Penal Code section 872(b) begins with the phrase, "Notwithstanding section 1200 of the Evidence Code" before setting forth its provision. Evidence Code section 1200 defines hear-

27. See *Nienhouse v. Superior Court*, 42 Cal. App. 4th 83, 49 Cal. Rptr. 2d 573 (1996).

28. 54 Cal. 3d 1063, 820 P.2d 262, 2 Cal. Rptr. 2d 160 (1991).

29. See *Nienhouse*, 42 Cal. App. 4th at 89-92, 49 Cal. Rptr. 2d at 576-78.

30. See *People v. Woodhead*, 43 Cal. 3d 1002, 1007, 741 P.2d 154, 156, 239 Cal. Rptr. 656, 658 (1987).

31. See *People v. Superior Court (Marks)*, 1 Cal. 4th 56, 65-66, 820 P.2d 613, 617, 2 Cal. Rptr. 2d 389, 392-93 (1991).

32. See *Whitman*, 54 Cal. 3d at 1082, 820 P.2d at 273, 2 Cal. Rptr. at 171.

33. See *Woodhead*, 43 Cal. 3d at 1007, 741 P.2d at 156, 239 Cal. Rptr. at 658.

say "as a statement that was made other than by a witness while testifying and that is offered to prove the truth of the matter stated."³⁴ According to the language of 872(b), (1) a law enforcement officer is allowed to testify to an out-of-court statement, (2) the statement may be offered for the truth of the matter asserted, and (3) a magistrate may base a finding of probable cause, either wholly or partially, on such statements.³⁵ The word "notwithstanding" means "despite" or "in spite of."³⁶ As used in this statute, "notwithstanding section 1200 of the Evidence Code" means that the following provision exists as law, even though by its own terms it would normally be inadmissible hearsay. Clearly, then, section 872(b) adds a new exception to the hearsay rule.

However, the rest of the statute does not refer to or address any other provisions of the Evidence Code. Given that the impact of section 872(b) on the hearsay rule was considered by the drafters of Proposition 115, as evidenced by the explicit reference to section 1200, and the fact that no other part of the hearsay rule and its exceptions were mentioned, the conclusion is inescapable that all other parts of the hearsay rule and its exceptions remain in effect. This conclusion is consistent with the statutory rule of construction that the failure to change the law in a particular respect when the subject is considered, and changes in other respects are made, is an indication of an intent to leave the law as it stands in the aspects not amended.³⁷ Without doubt, no other provision of the hearsay rule was changed by the enactment of subdivision (b) and the hearsay rule remains in full force and effect. However, the holding in *Nienhouse* creates a tension with other exceptions to the hearsay rule.

Evidence Code section 1220 permits the admission into evidence of a hearsay statement made by a party to an action when offered against the party.³⁸ In other words, in a criminal case the prosecutor may introduce into evidence hearsay statements made

34. CAL. EVID. CODE § 1200 (West 1995).

35. See CAL. PENAL CODE § 872(b) (West Supp. 1996).

36. WEBSTER'S NEW WORLD DICTIONARY 928 (3d ed. 1988).

37. See *Walker v. Superior Court*, 47 Cal. 3d 112, 129, 763 P.2d 852, 862, 253 Cal. Rptr. 1, 11 (1988).

38. CAL. EVID. CODE § 1220. "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity." *Id.*

by a defendant.³⁹ This provision, however, has consistently been interpreted to preclude the admission of a defendant's self-serving hearsay statements into evidence.

For example, in *People v. Edwards*⁴⁰ the California Supreme Court rejected the claim that the trial court erred in refusing to admit into evidence defendant's notebook proffered by the defense.⁴¹ The court held that "[a] defendant in a criminal case may not introduce hearsay evidence for the purpose of testifying while avoiding cross-examination."⁴² The court explained that the reason for this rule centers on the lack of reliability, the factor that is essential for a hearsay exception. When the defendant wrote those statements in the notebook after the crime had been committed, "[h]e had a compelling motive to deceive and seek to exonerate himself from, or at least to minimize his responsibility for, the shootings. There was 'ample ground to suspect defendant's motives and sincerity' when he made the statements."⁴³

This raises another issue. If the statement offered is a hearsay statement of a mental or physical condition, then the statement must comply with Evidence Code section 1252. That section provides that "a statement is inadmissible . . . if the statement was made under circumstances such as to indicate its lack of trustworthiness."⁴⁴ Given the concerns for reliability and trustworthiness noted by the cited supreme court opinions and that cross-examination of those statements is not available since the People cannot call the defendant as a witness, it would seem unlikely that this threshold requirement will ever be met.

Nevertheless, pursuant to the *Nienhouse* holding, a defendant's self-serving exculpatory statements are admissible at a preliminary hearing.⁴⁵ What is very troubling is that the court failed to address the fact that its holding conflicts with long-standing California Supreme Court precedent, which has been consistently fol-

39. *See id.*

40. 54 Cal. 3d 787, 819 P.2d 436, 1 Cal. Rptr. 2d 696 (1991).

41. *See id.* at 819-20, 819 P.2d at 456, 1 Cal. Rptr. 2d at 716.

42. *Id.* (citing *People v. Harris*, 36 Cal. 3d 36, 69, 679 P.2d 433, 453, 201 Cal. Rptr. 782, 802 (1984) (holding that defendant's poems were properly excluded because they were "offered as a means of testifying without submitting to cross examination.")).

43. *Id.* at 820, 819 P.2d at 456, 1 Cal. Rptr. 2d at 716 (citing *People v. Whitt*, 51 Cal. 3d 620, 643, 798 P.2d 849, 862, 274 Cal. Rptr. 252, 265 (1990)).

44. CAL. EVID. CODE § 1252.

45. *See Nienhouse*, 42 Cal. App. 4th at 86, 46 Cal. Rptr. 2d at 574-75.

lowed. The court also failed to explain how to reconcile this result with the manifest intent of Proposition 115 not to expand the rights of accused criminals.⁴⁶

B. *The Erosive Effect of Proposition 115*

Among the canons of statutory construction is the rule that "language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend"⁴⁷ and should not be interpreted to frustrate that intent.⁴⁸ However, the *Nienhouse* holding grants criminal defendants a new right that did not exist prior to the passage of the initiative, thereby expanding the rights of criminal defendants. Interpreting Proposition 115 to lead to this result violates the above cited rules of statutory construction as well as case precedent.

Another problem with the *Nienhouse* holding is the court's due process argument that "[a]ny other conclusion would work an unfairness and a lack of balance in the criminal process."⁴⁹ However, the California Supreme Court in *Whitman v. Superior Court*⁵⁰ came to the contrary conclusion. Central to the due process issue was whether section 872(b) was a broad grant of authority given to benefit one side and denied the other and, thus, was a violation of that federal constitutional right.⁵¹ The court found, however, that the limited hearsay exception granted to the People in section 872(b) did not qualify as a broad grant of authority.⁵² Rather, this hearsay exception was characterized by the court as a limited exception of a specialized nature. In conclusion, the *Whitman* court found that "in light of the specialized nature of the exception, we see nothing fundamentally unfair in failing to provide some similar hearsay exception favoring the defense."⁵³ Given this language, it is patently clear the court found that lack of reciprocity to the defense was not a denial of due process. Thus, the argument in

46. See BALLOT PAMPHLET, *supra* note 17, at 32.

47. *Bruce v. Gregory*, 65 Cal. 2d 666, 673, 423 P.2d 193, 198, 56 Cal. Rptr. 265, 270 (1967).

48. See *People v. Navarro*, 7 Cal. 3d 248, 273, 497 P.2d 481, 499, 102 Cal. Rptr. 137, 155 (1972).

49. *Nienhouse*, 42 Cal. App. 4th at 92, 49 Cal. Rptr. 2d at 578.

50. 54 Cal. 3d 1063, 1082, 820 P.2d 262, 273, 2 Cal. Rptr. 2d 160, 171 (1991).

51. See *id.*; see also *Wardius v. Oregon*, 412 U.S. 470, 475-76 (1973) (holding that a broad grant of authority given to one side, but not the other, would be a due process violation).

52. See *Whitman*, 54 Cal. 3d at 1082, 820 P.2d at 273, 2 Cal. Rptr. 2d at 171.

53. *Id.* (emphasis added).

Nienhouse lacks the support it claims.

Nienhouse also refers to the California Supreme Court's parenthetical notation in *Whitman* that left open the question whether "the defendant [may] call a law enforcement officer to relate statements which might rebut a finding of probable cause" as support for its holding.⁵⁴ This "question" is used by *Nienhouse* to argue that the California Supreme Court must have meant what *Nienhouse* concludes, that the section 872(b) hearsay exception applies to a defendant's statement.⁵⁵ Clearly, the conclusion that the defense may introduce a defendant's exculpatory hearsay statements through the testimony of a law enforcement officer is very different from the question of whether the defense may introduce *defense* evidence through the testimony of a law enforcement officer. The latter is the question left unanswered in *Whitman*, the former is the *Nienhouse* holding. Under closer scrutiny, the underpinnings of the *Nienhouse* court's due process argument continue to evaporate.

The *Nienhouse* court also argues that any other conclusion leads to unfairness and lack of balance in the criminal justice system.⁵⁶ Under existing law the defendant may put on a defense,⁵⁷ cross-examine the People's witnesses,⁵⁸ and even call the hearsay declarant to testify notwithstanding Evidence Code section 1203.1.⁵⁹ Yet the People may not call defendants to testify in violation of their Fifth Amendment right not to testify or to incriminate themselves.⁶⁰ Therefore, the People are precluded from cross-examining defendants as to their self-serving statements. Yet, the need for cross-examination is especially strong in this situation and, in fact, is compelling.⁶¹ Contrary to the court's argument in

54. *Id.*

55. *See Nienhouse*, 42 Cal. App. 4th at 90, 49 Cal. Rptr. 2d at 577.

56. *Id.* at 92, 49 Cal. Rptr. 2d at 578.

57. *See* CAL. PENAL CODE § 866 (West 1985 & Supp. 1996).

58. *See* *People v. Erwin*, 20 Cal. App. 4th 1542, 1550, 25 Cal. Rptr. 2d 348, 352 (1993).

59. *See id.* (holding that Evidence Code section 1203.1 does not preclude the defense from calling as a witness the declarant of the hearsay statements offered into evidence by the law enforcement officer's testimony).

60. U.S. CONST. amend. V. Presumably, the court in *Nienhouse* did not mean to imply that by virtue of the admission into evidence of a defendant's hearsay statement, the defendant has impliedly waived the Fifth Amendment right. That issue is not addressed in the court's opinion.

61. *People v. Livaditis*, 2 Cal. 4th 759, 779, 831 P.2d 297, 309, 9 Cal. Rptr. 2d 72, 84 (1992) (citing *People v. Edwards*, 54 Cal. 3d 787, 820, 819 P.2d 436, 456, 1 Cal. Rptr. 2d 696, 716 (1991)).

Nienhouse, its conclusion results in an unbalanced, unfair system allowing the admission of untested testimony.

Needless to say, this conclusion violates the specific intent of Proposition 115 since it denies the People the right to due process granted under section 30(b) of Article I of the California Constitution. The *Nienhouse* court's holding contravenes the rules of statutory construction.

It may be that an advocate of the *Nienhouse* position would argue that its conclusion is mandated since another rule of statutory construction requires that when a penal statute is reasonably susceptible of two conclusions, the one more favorable to the defendant should be adopted.⁶² However, the caveat to that rule is that it does not apply if the results are contrary to legislative intent or creates absurdities.⁶³ As shown above, the *Nienhouse* interpretation of Penal Code section 872(b) is contrary to the intent of the initiative and leads to absurd results.

III. CONCLUSION

Granting the admission of a defendant's exculpatory statements under section 872(b) is a significant erosion of the constitutional rights granted by Proposition 115. The court's holding in *Nienhouse* provides defendants with a new statutory right, deprives the People of due process at preliminary hearings, conflicts with recent holdings of the California Supreme Court and Evidence Code provisions, and violates several canons of statutory construction. Unfortunately, the court's opinion fails to address most of these issues, and for this reason as well, provides a most unacceptable conclusion.

62. See *People v. Simon*, 9 Cal. 4th 493, 517, 886 P.2d 1271, 1287, 37 Cal. Rptr. 2d 278, 293 (1995).

63. See *People v. Davis*, 166 Cal. App. 3d 760, 766, 212 Cal. Rptr. 673, 677 (1985) (citing *People v. Davis*, 29 Cal. 3d 814, 828-29, 633 P.2d 186, 193, 176 Cal. Rptr. 521, 528 (1981)).