Alabama Rules of Evidence

Article VIII. Hearsay

Rule 804.

Hearsay exceptions; declarant unavailable.

(a) *Grounds 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) now possesses 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 the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (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, lack of memory, inability, or absence is due to the procurement or 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:

(1) FORMER TESTIMONY. Testimony of a witness, in a former trial or action, given (A) under oath, (B) before a tribunal or officer having by law the authority to take testimony and legally requiring an opportunity for cross-examination, (C) under circumstances affording the party against whom the witness was offered an opportunity to test his or her credibility by cross-examination, and (D) in litigation in which the issues and parties were substantially the same as in the present cause.

(2) STATEMENT UNDER BELIEF OF IMPENDING DEATH. A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

(3) STATEMENT AGAINST INTEREST. A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

(4) STATEMENT OF PERSONAL OR FAMILY HISTORY. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) FORFEITURE BY WRONGDOING. A statement offered against a party that has engaged in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

[Amended 8-15-2013, eff. 10-1-2013.]

Advisory Committee's Notes

Section (a). Grounds of unavailability. Section (a) is patterned after the corresponding federal rule. It gives five grounds of "unavailability." Each of the four exceptions found in Rule 804(b) carries a condition precedent that the declarant be "unavailable." This is the threshold distinction between Rule 804(b) exceptions and those found in Rule 803.

Assertion of a privilege. Whenever a court-approved assertion of privilege precludes a declarant/witness from relating the subject matter of the witness's own statement, the witness is then "unavailable" for the purpose of activating the Rule 804(b) exceptions. This ground of "unavailability" is consistent with traditional Alabama practice. See *Miles v. State*, 476 So.2d 1228 (Ala.Crim.App.1985); *Wyatt v. State*, 35 Ala.App. 147, 46 So.2d 837, cert. denied, 254 Ala. 74, 46 So.2d 847 (1950). See also C. Gamble, McElroy's Alabama Evidence § 245.07(8) (4th ed. 1991).

Refusal to testify. Even in the face of judicial pressure, some witnesses stand by their refusal to testify. A refusal to testify as to the subject matter of the declarant/witness's statement, in face of a court order to do so, constitutes "unavailability" for the purpose of activating the exceptions of Rule 804(b). Alabama has little preexisting authority dealing with whether a refusal to testify equates with unavailability. Adopting the principle that it does, however, is fully consistent with the modern trend in the United States as a whole. See *United States v. Gonzalez*, 559 F.2d 1271, 1272-73 (5th Cir.1977); E. Cleary, McCormick on

Evidence § 249.01(2) (3d ed. 1984).

Lack of memory. A declarant/witness's lack of memory concerning the subject matter of his or her statement satisfies the unavailability requirement of the Rule 804(b) exceptions. The witness's own testimony will be offered to establish the lack of memory. Thus, the committee envisions that the witness will be produced and subjected to cross-examination. It was stated in House Comm. on Judiciary, Fed. Rules of Evidence, H.R. Rep. No. 650, 93d Cong., 1st Sess., 15 (1973): "[T]he Committee intends no change in existing federal law under which the court may choose to disbelieve the declarant's testimony as to his lack of memory. See *United States v. Insana*, 423 F.2d 1165, 1169-1170 (2nd Cir.), cert. denied, 400 U.S. 841 (1970)." While this ground of "unavailability" has no counterpart under preexisting Alabama law, it is fully consistent with the national trend. See M.A.L., Annotation, *Admissibility of Testimony of Witness at Former Trial or in Another Case to Cover Gaps or Omissions, Due to Faulty Memory or Other Causes, in His Present Testimony Given in Person or by Deposition,* 129 A.L.R. 843 (1940).

Death or physical or mental illness or infirmity. Unavailability, as a prerequisite for the admission of a declarant's statement under the Rule 804(b) exceptions, has long been held to be satisfied by death. See *Hill v. State*, 455 So.2d 930 (Ala.Crim.App.), aff'd, 455 So.2d 938 (Ala.), cert. denied, 469 U.S. 1098 (1984); *Barfield v. Evans*, 187 Ala. 579, 65 So. 928 (1914); *Mattox v. United States*, 156 U.S. 237 (1895). See also C. Gamble, McElroy's Alabama Evidence §§ 245.07(8), 249.01(2) (4th ed. 1991). Additionally, traditional evidence law has recognized physical or mental illness or infirmity as making a hearsay declarant unavailable. See *Howard v. State*, 49 Ala.App. 548, 274 So.2d 104 (1973) (physical illness); *Marler v. State*, 67 Ala. 55 (1880) (insanity). Compare Ala.R.Civ.P. 32(a)(3) (dealing with the unavailability requirement as a condition for using at trial a person's deposition).

Absence. As under preexisting Alabama common law, a declarant is not rendered unavailable by absence alone. Beyond the fact that the declarant is absent from the hearing, the proponent of the statement must show an inability to procure the declarant's attendance by either legal process or other reasonable means. *Williams v. Calloway*, 281 Ala. 249, 201 So.2d 506 (1967) (unavailability established by a showing of permanent or indefinite absence from Alabama); *Pope v. State*, 183 Ala. 61, 63 So. 71 (1913) (diligent search fails to find declarant). "Reasonable means" may include in some cases, but not all, an attempt to take the declarant's deposition.

Absence that is procured by the proponent of the statement does not satisfy the requirement of unavailability. *McCoy v. State*, 221 Ala. 466, 129 So. 21 (1930). See C. Gamble, McElroy's Alabama Evidence § 245.07(8) (4th ed. 1991).

A proponent of a statement who attempts to prove the declarant's absence must show that he or she took reasonable steps to secure the deposition of the declarant, if the statement was a statement made under a belief of impending death, a statement against interest, or a statement concerning personal or family history. No such showing is required to establish absence for activation of the "former testimony" exception. As stated in House Comm. on Judiciary, Fed. Rules of Evidence, H.R. Rep. No. 650, 93d Cong., 1st Sess., 15 (1973):

> "Rule 804(a)(5) as submitted to the Congress provided, as one type of situation in which a declarant would be deemed 'unavailable,' that he be 'absent

> from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.' The Committee amended the Rule to insert after the word 'attendance' the parenthetical expression '(or, in the case of a hearsay exception under subdivision (b)(2),(3), or (4), his attendance or testimony).' The amendment is designed primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being deemed unavailable. The Committee, however, recognized the propriety of an exception to this additional requirement when it is the declarant's former testimony that is sought to be admitted under subdivision (b)(1)."

As a general safety clause, Rule 804(a) provides that none of the stated grounds of unavailability suffices when the unavailability has been brought about by improper actions of the party offering the statement. Unavailability is not present where the declarant's exemption, refusal, lack of memory, inability, or absence is due to the proponent's procurement or wrongdoing. This principle has been long recognized in Alabama law. See *McCoy v. State*, 221 Ala. 466, 129 So. 21 (1930).

Subsection 804(b)(1). Former testimony. This subsection is taken almost verbatim from language continually quoted by Alabama courts. See, e.g., *Jones v. State*, 603 So.2d 419, 421 (Ala.Crim.App.1992); *Henderson v. State,* 598 So.2d 1045, 1049 (Ala.Crim.App.1992); *Nolen v. State*, 469 So.2d 1326 (Ala.Crim.App.985); *Williams v. State,* 375 So.2d 1257, 1269 (Ala.Crim.App.), cert. denied, 375 So.2d 1271 (Ala.1979). See also C. Gamble, McElroy's Alabama Evidence § 245.07(1) (4th ed. 1991). It is intended as a restatement of preexisting Alabama law with regard to the "former testimony" exception to the hearsay rule except that, of course, Rule 804(a) liberalizes the grounds of unavailability. See Ala.R.Evid. 804(a).

It is not absolutely required that a civil party against whom the former testimony is offered have been a party to the prior proceeding. It is sufficient if that party is in privity with, or is a successor of, a former party. See *Julian v. Woolbert,* 202 Ala. 530, 81 So. 32 (1919); *Long v. Davis*, 18 Ala. 801 (1851). See also C. Gamble, McElroy's Alabama Evidence § 245.07(7) (4th ed. 1991). The term "privity" is left to be defined by the common law. However, the committee intends that the result on the privity issue reached in *Clay v. Johns-Manville Sales Corp*., 722 F.2d 1289 (6th Cir.1983), cert. denied, 467 U.S. 1253 (1984), be rejected.

Subsection 804(b)(2). Statement under belief of impending death. This is an expanded version of the historic "dying declaration" exception to the hearsay rule. Under this rule, as under preexisting Alabama law, however, this exception does not apply in civil cases. See *O'Bar v. Southern Life & Health Ins. Co*., 232 Ala. 459, 168 So. 580 (1936). See also C. Gamble, McElroy's Alabama Evidence § 248.01(2) (4th ed. 1991). Under the common law of Alabama, the dying declaration exception applied only in criminal cases in which the death of the declarant served as the basis of the prosecution. Application of this traditional requirement had the peculiar result of excluding the dying declaration of A in a prosecution for the death of B when both were killed in the same affray with the accused. See *Allsupp v. State*, 15 Ala.App. 121, 72 So. 599 (1916). Rule 804(b)(2), on the other hand, applies in all criminal cases.

The threshold requirement for the dying declaration at common law was that the declarant must have actually died. Under the Rule 804(b)(2) version of the exception, however,

the declarant need only be "unavailable," within the meaning of Rule 804(a). This fact results in the possibility that one could make a dying declaration that would be admissible despite the fact that the declarant has not died. Indeed, Rule 804(b)(2) now labels the present exception as "statement under belief of impending death" rather than "dying declaration."

The basic requirement for all dying declarations, whether offered under historic common law or under the present rule, is that the declarant must have believed that death was certain and imminent. This belief is to be determined from the objective facts surrounding the making of the statement. In this regard, preexisting Alabama case law continues with regard to the relevant factors that go to furnish such a belief. See *Voudrie v. State*, 387 So.2d 248 (Ala.Crim.App.), cert. denied, 387 So.2d 256 (Ala.1980). See also C. Gamble, McElroy's Alabama Evidence § 248.01(1) (4th ed. 1991).

Rule 804(b)(2), like the pre-rules cases stating the dying declaration exception, limits the exception to statements that relate to the cause or circumstances of what the declarant believed to be the declarant's impending death. See *Hayes v. State*, 395 So.2d 127 (Ala.Crim.App.1980), cert. denied, 395 So.2d 150 (Ala.1981). A statement qualifies under this exception, even if in the form of an opinion, so long as it satisfies Ala.R.Evid. 701. Compare *Sidney v. State*, 265 Ala. 136, 89 So.2d 745 (1956). The firsthand knowledge rule, found in Ala.R.Evid. 602, continues to be applied to the declarations made admissible by Rule 804(b)(2).

Subsection 804(b)(3). Statement against interest. This subsection acknowledges the admissibility of a statement that was, at the time the statement was made, against the pecuniary or proprietary interest of the declarant. Rule 804(b)(3) is no more than a restatement of the preexisting common law exception to the hearsay rule. See *Lavett v. Lavett*, 414 So.2d 907 (Ala.1982), overruled by *McBride v. McBride*, 548 So.2d 155 (Ala.1989). See also C. Gamble, McElroy's Alabama Evidence § 249.01(1) (4th ed. 1991). The declarant must be "unavailable" at the time the statement is offered. The grounds of "unavailability" have undergone dramatic expansion. See Ala.R.Evid. 804(a). If the statement is that of a party, and if it is offered against the party by the opponent, then it qualifies as an admission and carries no requirement of being against interest at the time that it was made. See Ala.R.Evid. 801(d)(2).

Rule 804(b)(3) is not intended to negate prior Alabama case law excluding exculpatory statements of third persons offered by the accused in a criminal case. See *Flowers v. State*, 586 So.2d 978 (Ala.Crim.App.), cert. denied, 596 So.2d 954 (Ala.1991), cert. denied, 504 U.S. 930 (1992); *Garrison v. State*, 416 So.2d 793 (Ala.Crim.App.1982); C. Gamble, McElroy's Alabama Evidence § 249.02 (4th ed. 1991).

The essence of the exception continues to be that the statement was against the interest of the declarant at the time the statement was made. In determining whether the facts satisfy the against-interest requirement, the judge considers the declarant to have the traits of a reasonable person. This is consistent with traditional Alabama law. See *McCord v. State*, 220 Ala. 466, 126 So. 873 (1930).

Subsection 804(b)(4). Statement of personal or family history. Statements regarding the declarant's own personal or family history – e.g., birth, adoption, marriage, divorce, legitimacy, relationship by blood, ancestry, or other similar fact of personal or family

history – are exempted from the hearsay rule of exclusion by Rule 804(b)(4)(A). Like its predecessor at common law, this exception carries the requirement that the declarant be unavailable at the time the statement is offered. See *Landers v. Hayes*, 196 Ala. 533, 72 So. 106 (1916); C. Gamble, McElroy's Alabama Evidence § 250.01 (4th ed. 1991); J. Colquitt, Alabama Law of Evidence § 8.4(d) (1987). Any requirement that the declarant have had personal knowledge of the matters contained in the statement is expressly inapplicable. See *Martin v. State*, 17 Ala.App. 73, 81 So. 851 (1919).

Under (B), statements regarding matters of another person's personal or family history, including death, are admissible. If the person being spoken about is a member of the declarant's family, whether by blood or adoption or marriage, then admission of the statement is consistent with prior Alabama practice. See *Chambers v. Morris*, 159 Ala. 606, 48 So. 687 (1909); C. Gamble, McElroy's Alabama Evidence § 250.02 (4th ed. 1991). However, this Rule 804(b)(4)(B) exception, unlike the related exception recognized by the preexisting common law, encompasses such statements about one to whom the declarant is not related but with whose family the declarant is intimately associated.

Subsection 804(b)(5). Absence of residual or catchall exception. It should be noted that Rule 804(b), unlike the corresponding federal rule, contains no residual or catchall exception. See Fed.R.Evid. 804(b)(5). See also Ala.R.Evid. 803(24) advisory committee's notes.

Advisory Committee's Notes to Amendment to Rule 804(b) Effective October 1, 2013

Rule 804(b)(2) is amended to allow its use in civil and criminal cases. Because the historical basis for allowing this exception is the psychological motivation that a belief in impending death enhances the credibility of the declarant's statement, there is no rational basis for differentiating between criminal or civil actions.

Rule 804(b)(5) has been added 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 procured the unavailability of the declarant as a witness. This exception recognizes the need for a prophylactic rule to deal with 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). This rule applies to all parties, including the government.

Alabama's Rule 804(b)(5) represents a slight departure from its federal counterpart, Fed. R. Evid. 804(b)(6), which was added by amendment in 1997. Federal Rule 804(b)(6) provides a hearsay exception for statements by unavailable witnesses when the party against whom the statement is offered "caused -- or acquiesced in wrongfully causing -- the declarant's unavailability as a witness, and did so intending that result." Alabama's Rule 804(b)(5) rejects the phrase "or acquiesced" due to its breadth. This departure from the federal model is not intended to limit the court's ability to interpret the breadth of the term "engaged in wrongdoing," although it is intended to exclude situations in which a party's mere inaction might otherwise be held to effect a forfeiture.

It is left to the courts to interpret when "wrongdoing" has occurred. See, *e.g., United States v. White*, 116 F.3d 903, 916 (D.C. Cir. 1997) (holding that two defendants who murdered a potential witness forfeited their confrontation and hearsay objections to statements of that witness); *United States v. Dhina*, 243 F.3d 635, 644-45 (2d Cir. 2001) (applying exception when defendant ordered others to kill witnesses, supplied weapons in one killing, and personally participated in another); and *United States v. Potamitis,* 739 F.2d 784, 788-89 (2d Cir. 1984) (admitting grand-jury testimony of witness who fled country after being threatened by the defendant). The wrongdoing need not consist of a criminal act. Compare *United States v. Scott*, 284 F.3d 758, 764 (7th Cir. 2002) ("applying pressure on a potential witness not to testify, including by threats of harm and suggestions of future retribution, is wrongdoing"), with *Commonwealth v. Edwards*, 444 Mass. 426, 541 n. 23, 830 N.E.2d 158, 171 n.23 (2005) (putting forth the idea to avoid testifying by use of threats, coercion, persuasion, or pressure may be sufficient to constitute forfeiture, but merely informing a witness of their right to remain silent does not constitute pressure or persuasion).

The intent requirement of Ala. R. Evid. 804(b)(5) "means that the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable." *Giles v. California*, 554 U.S. 353, 367 (2008) (interpreting Fed. R. Evid. 804(b)(6)).

In determining whether there is a forfeiture, the usual Rule 104(a) preponderance-of-the-evidence standard has been adopted (rather than a clear-and-convincing-evidence standard) in light of the behavior Rule 804(b)(5) seeks to discourage. See *Davis v. Washington*, 547 U.S. 813, 833 (2006) (observing that federal courts applying Fed. R. Evid 804(b)(6) have generally held the Government to the preponderance-of-the-evidence standard); *United States v. Zlatogur*, 271 F.3d 1025, 1028 (11th Cir. 2001) (adopting the preponderance-of-the-evidence standard for determining whether to admit hearsay under Fed. R. Evid. 804(b)(6)).

Note from reporter of decisions: The order amending Rule 404(a), Rule 405(a), Rule 407, Rule 408, Rule 412, Rule 510, Rule 608(b), Rule 703, Rule 801(d), Rule 803(6), Rule 804(b), and Rule 1103, Ala. R. Evid., and adopting Rule 902(11) and (12), Ala. R. Evid., and the Advisory Committee's Notes to the amendment or adoption of these rules, effective October 1, 2013, is published in that volume of *Alabama Reporter* that contains Alabama cases from ___ So. 3d.