Forfeiture by Wrongdoing: A Survey and an Argument for its Place in Florida

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I. Introduction

Florida, currently besieged by gangs, drug trafficking, organized crime, and domestic violence, is waging combat with one arm tied behind its back. The restrained arm is the judicial system's ability to disincentivize and punish witness tampering. But Florida does not have to be in this inefficacious position. In fact, Florida already has the ability to untie its hand and strengthen its defenses against those seeking to undermine a foundational element of the justice system. Florida can accomplish this by recognizing and adopting forfeiture by wrongdoing, the legal principle that equitably extinguishes the right to confrontation.

This paper surveys and discusses the body of law that has been created through the use of forfeiture by wrongdoing in the United States. Part II is a review of *Reynolds v. United States,*[1] which was the first case in which the United States Supreme Court recognized forfeiture by wrongdoing. Part III surveys the different reasons that courts and legislatures have used to justify the adoption and use of forfeiture by wrongdoing. Part IV is a survey of the contemporary state of the law on forfeiture by wrongdoing as of the authoring of this paper. As part of this survey, this paper identifies where there has been disagreement, as well as agreement, regarding the elements or uses of forfeiture by wrongdoing. This paper then presents an argument in Part V for the recognition and adoption of forfeiture by wrongdoing in Florida. The

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[1] 98 U.S. 145 (1878).

argument about recognition is advanced because in order to use forfeiture by wrongdoing, Florida would only need to ratify the extant substantial common law basis for forfeiture by wrongdoing. The argument about adoption is made because an amendment to the *Florida Evidence Code* regarding forfeiture by wrongdoing is both desirable and necessary. Part VI provides the specific text of the proposed amendment to the *Florida Evidence Code* as well as a suggestion for the content of the accompanying Law Revision Council note and Florida Supreme Court adoption opinion.

II. The Introduction of Forfeiture by Wrongdoing into American Jurisprudence

Reynolds v. United States, a bigamy prosecution, is the first United States Supreme Court case to address the rule of forfeiture by wrongdoing.[2] The defendant claimed on appeal that the trial court erred by permitting the government to introduce into evidence the testimony of Amelia Jane Schofield, his second wife, when this testimony was from a previous trial of the defendant and Mrs. Schofield had not testified in the current trial.[3] The record showed that Mrs. Schofield, who was a witness for the Government, lived only with the defendant and that an officer who personally knew Mrs. Schofield went to find her in order to serve her with a subpoena.[4] The record also showed that the defendant told that officer that Mrs. Schofield was not home and the defendant would not say where she was.[5] The defendant did not put forth any evidence to rebut the Government's claim that he was hiding Mrs. Schofield, or offer any explanation for why the officer could not serve Mrs. Schofield.[6] On this record, the trial court ruled Mrs. Schofield's former testimony was admissible.[7]

The Supreme Court first looked to English common law and cited *Lord Morley's Case*—the oldest English opinion permitting the reading of prior sworn testimony when it was proven that the witness

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2 *See id*.

3 *Id.* at 158-59.

4 *Id.* at 160.

5 *Id.*

6 *Id.*

7 *Id.*

did not testify at trial because of some wrongful act by the accused.[8] This case dates back to 1666.[9] The Court also cited two other English cases before looking to an American case, *Williams v. State*.[10] The Court further found that at the time it wrote the *Reynolds* opinion leading textbooks recorded a well-accepted rule that "if a witness is kept away by the adverse party, his [or her] testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence."[11] The Court also noted that according to the rule established at that time, a witness must be absent because of some wrongdoing by the adverse party, that is, the wrongdoing must be a cause for the absence.[12] The Supreme Court concluded that the rule of forfeiture by wrongdoing was "long-established."[13]

The Court also addressed whether a judge or a jury should determine if forfeiture by wrongdoing occurred, the standard that the trial judge is to apply when determining whether forfeiture by wrongdoing has occurred, as well as the standard of review for reviewing a judge's determination that statements should be admitted under the rule of forfeiture by wrongdoing.[14] The Court found that a question of whether there had been forfeiture by wrongdoing is one that is to be decided by a judge.[15] The Court also decided that a trial judge's determination of whether there has been sufficient evidence of forfeiture by wrongdoing was to be made under the same standard as the determination of whether sufficient evidence of a loss of a written contract was adduced before secondary evidence of that contract's contents could be admit-

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[8] *Id.* (citing Lord Morley's Case, 6 State Trials 770 (1666)).

[9] *Id*.

[10] *Id.* (citing Williams v. State, 19 Ga. 403 (1856)). The English cases the Court cited to are Harrison's Case, 12 State Trials 833 (1692), and Regina v. Scaife, 17 Ad. & El. N.S. 242 (1851).

[11] *Reynolds*, 98 U.S. at 158-59.

[12] *Id.* at 159. The Court did not, however, state whether wrongdoing alone is the only sufficient condition. In other words, the Court did not determine what quantum of the cause for absence had to be attributed to an adverse party's wrongdoing. The Court also gave no guidance as to which acts would be sufficient for forfeiture by wrongdoing. However, this has been remedied by the federal appellate courts as well as state courts. *See* discussion *infra* Part IV.G.

[13] *Reynolds,* 98 U.S. at 159.

[14] *Id.*

[15] *Id.*

ted.[16] Because the trial court would be making a finding of fact, the standard of review for this determination was abuse of discretion.[17] The Court reached each of these conclusions by characterizing the question of whether forfeiture by wrongdoing occurred as an issue of whether there had been sufficient evidence presented to permit the introduction of secondary evidence.[18] This characterization made logical the analogy to the rule in contract law regarding the admission of secondary evidence of a contract's contents.[19]

The Supreme Court grounded its legal rationale as a matter of fairness and a desire to ensure the legitimacy of an adversarial judicial system.[20] The Court refined the general maxim of "no one shall be permitted to take advantage of his own wrong"[21] into a constitutional maxim: "The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts."[22] Thus, in *Reynolds* the Supreme Court created a rule of constitutional magnitude.

The Court began its analysis by referencing the Sixth Amendment right of an accused to confront witnesses against him or her.[23] The Court then concluded that forfeiture by wrongdoing is a part of American common law and may trump the Sixth Amendment right to

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[16] *Id*. To establish a lost instrument in Florida under the common law, the party seeking to establish its existence needed to produce clear and convincing evidence. Cross v. Aby, 55 Fla. 311, 320-21 (Fla. 1908). *See* discussion of the burdens of proof applied by courts today regarding forfeiture by wrongdoing *infra* Part IV.E.

[17] *Reynolds*, 98 U.S. at 156. The Court used the wording "unless the error is manifest." *Id.* This is the equivalent of the current "abuse of discretion" standard. *See* Weitz v. Lovelace Health System, Inc., 214 F.3d 1175, 1181 (10th Cir. 2000) (noting that, under the abuse of discretion standard, an appellate court will not reverse the trial court's decision unless the trial court has made "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment.") (internal quotations omitted).

[18] *Reynolds*, 98 U.S. at 159.

[19] *See id*.

[20] *See id.* These concerns are echoed in the Advisory Committee's Notes to Federal Rules of Evidence 804(b)(6), which is the federal codification of forfeiture by wrongdoing. FED. R. EVID. 804(b)(6) advisory committee's note to 1997 amendment.

[21] *Id.* at 159.

[22] *Id.* at 158.

[23] *See id*. at 158.

confrontation.[24] The Court's policy rationale also was grounded in the Federal Constitution.[25] The Court's conclusion that forfeiture by wrongdoing could defeat a constitutional right, in addition to the constitutional rooting of the policy recognized as underlying forfeiture by wrongdoing,[26] leads to the conclusion that forfeiture by wrongdoing is a rule of constitutional law.

Reynolds can be characterized as having narrow applicability. The Court had before it a case involving prior sworn testimony from a previous trial for the same charge. The Court stated succinctly, "[i]t was substantially testimony given at another time in the same cause."[27] However, even if *Reynolds* is a case of narrow application, it was only the genesis of the American recognition and incorporation of forfeiture by wrongdoing. The rule has evolved greatly since *Reynolds* and has wide application without any disavowals.[28] Further, the United States Supreme Court recently reintroduced forfeiture by wrongdoing to the constitutional spotlight. In its only treatments of the rule of forfeiture by wrongdoing since *Reynolds*, the Supreme Court in *Crawford v. Washington* and *Davis v. Washington* reminded American lawyers that the confrontation right may be equitably extinguished through forfeiture by wrongdoing.[29]

III. The Legal Justifications for Forfeiture—Why the Courts Strike Back

"The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong . . . ."[30] To elaborate more on the equitable basis for forfeiture by wrongdoing, the United States Supreme Court recently reaffirmed equity as the source of the court's authority to find that a defendant forfeited his or her confronta-

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[24] *Id.* at 159.

[25] *See id.* at 158.

[26] *See id.* This is not to say that the rule of forfeiture by wrongdoing is constitutionally required, as this issue was not addressed by the Supreme Court in *Reynolds*.

[27] *Id.* at 160-61.

[28] *See* discussion *infra* Part IV.

[29] *See* 547 U.S. 813, 833 (2006); 541 U.S. 36, 62 (2004).

[30] *Reynolds*, 98 U.S. at 159.

tion rights in two separate cases.[31] Federal courts, as well as state courts, have repeatedly acknowledged the equitable basis for forfeiture by wrongdoing.[32] All of these courts have recognized that it is unfair for a defendant to wrongly weaken the government's case and then benefit from having committed that wrong. Equity, as the basis for adopting forfeiture by wrongdoing, was central to the universally-accepted conclusion that confrontation rights can be forfeited through the foreseeable actions of co-conspirators that are taken in furtherance of the conspiracy.[33]

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[31] *See Davis*, 547 U.S. at 833 ("We reiterate what we said in *Crawford*: that 'the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.'"); *Crawford*, 541 U.S. at 62 ("[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds . . . .").

[32] *See* United States v. White, 116 F.3d 903, 911 (D.C. Cir. 1997) ("Simple equity supports a forfeiture principle . . . ."); United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996) ("[C]ourts will not suffer a party to profit from his own wrongdoing."); United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982) ("Any other result would mock the very system of justice the confrontation clause was designed to protect."); United States v. Thevis, 665 F.2d 616, 630 (5th Cir. 1982), *superseded by statute on other grounds*, FED. R. EVID. 804(b)(6) ("The law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him."); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1980) ("[U]nder the common law principle that one should not profit by his own wrong, coercion can constitute voluntary waiver of the right of confrontation."), *overruled on other grounds by* United States v. Willis, 102 F.3d 1078 (10th Cir. 1996); State v. Henry, 820 A.2d 1076, 1086 (Conn. App. Ct. 2003) ("Neither in criminal nor civil cases will the law allow a person to take advantage of his own wrong."); Devonshire v. United States, 691 A.2d 165, 168 (D.C. 1997) (citing *Reynolds*, 98 U.S. 145 and *Houlihan*, 92 F.3d 1271); State v. Gettings, 769 P.2d 25, 28 (Kan. 1989) (citing *Thevis*, 665 F.2d 616); Commonwealth v. Edwards, 830 N.E.2d 158, 167 (Mass. 2005) ("[A] party may not gain advantage from his own wrong."); People v. Jones, 714 N.W.2d 362, 367-68 (Mich. Ct. App. 2006) (finding that defendant's constitutional right to confrontation was waived because the declarant's unavailability was procured by defendant's own wrongdoing); State v. Alvarez-Lopez, 98 P.3d 699, 703 (N.M. 2004) (citing *Mastrangelo*, 693 F.2d 269); People v. Geraci, 649 N.E.2d 817, 821 (N.Y. 1995) (citing Mastrangelo, 693 F.2d 269); Gonzalez v. State, 195 S.W.3d 114, 117 (Tex. 2006) ("[T]he rule is based on 'common honesty'. . . .") (citation omitted); State v. Mason, 162 P.3d 396, 404 (Wash. 2007) ("[E]quity compels adopting the doctrine of forfeiture by wrongdoing.").

[33] *See*, *e.g.*, United States v. Cherry, 217 F.3d 811, 816-20 (10th Cir. 2000). *See* discussion *infra* Part IV.G.

Although equity is a significant premise justifying the use of forfeiture by wrongdoing, it can be observed that three other justifications have arisen. One of these other justifications is that forfeiture by wrongdoing aids in preserving "the integrity of the adversary process by deterring litigants from acting on strong incentives to prevent the testimony of an adverse witness."[34] Another justification for forfeiture by wrongdoing is that it "furthers the truth-seeking function of the adversary process [by] allowing fact finders access to valuable evidence no longer available through live testimony."[35] Furthermore, because forfeiture by wrongdoing works as a powerful disincentive, it functions as a protection for witnesses.[36]

Significant justifications for applying forfeiture by wrongdoing are also found in the rationale underlying the application of waiver, and most recently, estoppel. The arguments for using a waiver rationale are most clearly advanced in the scholarship of Professor James Flanagan. In *Confrontation, Equity, and the Misnamed Exception for "Forfeiture" by Wrongdoing*, Professor Flanagan argued that not only was equity historically not the basis for forfeiture by wrongdoing, but that using equity would result in a defendant too easily compromising his or her fundamental right to confrontation.[37] Professor Flanagan argued that courts should instead use a waiver rationale.[38] This argument was pre-

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[34] *Edwards*, 830 N.E.2d at 167 (internal quotations omitted) (citing Steele v. Taylor, 684 F.2d 1193, 1202 (6th Cir. 1982)); s*ee also* HAW. R. EVID. 804(b)(7) supplemental cmt. ("This recognizes the need for a prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of Justice itself.'") (citation omitted); United States v. Gray, 405 F.3d 227, 241-42 (4th Cir. 2005) (noting that the "clear purpose" of forfeiture by wrongdoing is to deter witness tampering); United States v. Thompson, 286 F.3d 950, 962 (7th Cir. 2002) ("The primary reasoning behind this rule is obvious-to deter criminals from intimidating or 'taking care of' potential witnesses against them."); *White*, 116 F.3d at 911 ("[C]ommon sense attention to the need for fit incentives [justifies forfeiture by wrongdoing]."); People v. Stechly, 870 N.E.2d 333, 350 (Ill. 2007) (justifying forfeiture by wrongdoing as a disincentive for those who wish to impede the judicial process); *Geraci*, 649 N.E.2d at 821 ("The rule is invoked to '[protect] the integrity of the adversary process . . . .'") (citation omitted); *Gonzalez*, 195 S.W.3d at 118 (finding forfeiture by wrongdoing is justified as a disincentive for witness tampering by organized crime).

[35] *Edwards*, 830 N.E.2d at 167.

[36] *Id*.

[37] 14 WM. & MARY BILL RTS. J. 1193, 1199 (2006).

[38] *Id.* at 1196.

mised on his survey of applicable cases, interpretation of *Reynolds*, and specific understanding of what *waiver* and *forfeiture* mean.[39] Most recently, Professor Flanagan argued that *estoppel* is the better conceptual framework to use for forfeiture by wrongdoing because it "accommodates both waiver and forfeiture while also incorporating the rich traditions of equity that may be necessary to define the contours of this important constitutional doctrine."[40]

It is important that any jurisdiction that uses forfeiture by wrongdoing is aware of the justifications it uses for the rule, and is forthright about the conceptual framework to which forfeiture by wrongdoing is to be analogized. The justifications and conceptual framework used affects the applicability of certain policy arguments when courts apply forfeiture by wrongdoing. As will be illuminated in the next part of this paper, the justifications and conceptual framework that a jurisdiction uses when applying forfeiture by wrongdoing will also affect the very elements that are required to be part of the rule of forfeiture by wrongdoing.

IV. A Survey of the Contemporary State of Federal and State Pronouncements Regarding Forfeiture by Wrongdoing

As of this paper's drafting in late 2007, ten federal appellate courts[41] and state courts in twenty-eight states[42] had written decisions

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[39] *See id*.

[40] James Flanagan, *Foreshadowing the Future of Forfeiture/Estoppel by Wrongdoing: Davis v. Washington and the Necessity of the Defendant's Intent to Intimidate the Witness*, 15 J.L. & Pol'y 863, 867-68 (2007). Professor Flanagan points out that Professor Richard Friedman has also argued that estoppel is a better underlying justification for forfeiture by wrongdoing. *Id*. at 867-68 (citing Richard Friedman, *Confrontation and the Definition of Chutzpa*, 31 Isr. L. Rev. 506, 517 (1997)).

[41] *See* United States v. Garcia-Meza, 403 F.3d 364, 369-71 (6th Cir. 2005); United States v. Gray, 405 F.3d 227, 240-43 (4th Cir. 2005); United States v. Scott, 284 F.3d 758, 762 (7th Cir. 2002); United States v. Cherry, 217 F.3d 811, 815 (10th Cir. 2000); United States v. White, 116 F.3d 903, 911-16 (D.C. Cir. 1997); United States v. Houlihan, 92 F.3d 1271, 1278-82 (1st Cir. 1996); United States v. Rouco, 765 F.2d 983, 994-95 (11th Cir. 1985); United States v. Mastrangelo, 693 F.2d 269, 272-74 (2d Cir. 1982); United States v. Thevis, 665 F.2d 616, 627-33 (5th Cir. 616), *superseded by statute on other grounds*, Fed. R. Evid. 804(b)(6); United States v. Carlson, 547 F.2d 1346, 1358 (8th Cir. 1977);

addressing forfeiture by wrongdoing. The United States Supreme Court, with Congress's assent, adopted an evidentiary rule in 1997 addressing forfeiture by wrongdoing.[43] Twelve states, as well as the federal courts, have a codified version of forfeiture by wrongdoing.[44] In total, thirty-three jurisdictions[45] have, through either the common law or the creation of a court rule or statute, addressed forfeiture by wrongdoing.[46] No jurisdiction has refused to adopt the principle of forfeiture by

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[42] *See* State v. Valencia, 924 P.2d 497, 501-04 (Ariz. Ct. App. 1996); People v. Giles, 152 P.3d 433, 438 (Cal. 2007), *cert. granted*, Giles v. California, 128 S. Ct. 976 (2008) (mem.).; Vasquez v. People, 173 P.3d 1099, 1103 (Colo. 2007) (en banc); State v. Henry, 820 A.2d 1076, 1082-90 (Conn. App. Ct. 2003); Charbonneau v. State, 904 A.2d 295, 317-19 (Del. 2006); Devonshire v. United States, 691 A.2d 165, 166 (D.C. 1997); People v. Stechly, 870 N.E.2d 333, 348-54 (Ill. 2007); State v. Hallum, 606 N.W.2d 351, 354-55 (Iowa 2000); State v. Gettings, 769 P.2d 25, 28-30 (Kan. 1989); State v. Magouirk, 561 So. 2d 801, 806 (La. Ct. App. 1990); Wildermuth v. State, 530 A.2d 275, 284 n.14 (Md. 1987); Commonwealth v. Edwards, 830 N.E.2d 158, 527 (Mass. 2005); People v. Bauder, 712 N.W.2d 506, 512-15 (Mich. Ct. App. 2006); State v. Fields, 679 N.W.2d 341, 347 (Minn. 2004); State v. Mizenko, 127 P.3d 458, 470 n.2 (Mont. 2006); State v. Warford, 389 N.W.2d 575, 580 (Neb. 1986); State v. Sheppard, 484 A.2d 1330, 1345-49 (N.J. Super. Ct. Law. Div. 1984); State v. Alvarez-Lopez, 98 P.3d 699, 703-05 (N.M. 2004); People v. Geraci, 649 N.E.2d 817, 820-21 (N.Y. 1995); State v. Lewis, 619 S.E.2d 830, 846 (N.C. 2005), *aff'd as modified by* State v. Lewis, 648 S.E.2d 824, 830 (N.C. 2007); State v. Hand, 840 N.E.2d 151, 170-72 (Ohio 2006); State v. Page, 104 P.3d 616, 621-24 (Or. Ct. App. 2005); Commonwealth v. Stantiago, 822 A.2d 716, 729-31 (Pa. Super. Ct. 2003); State v. Ivy, 188 S.W.3d 132, 145-48 (Tenn. 2006); Gonzalez v. State, 195 S.W.3d 114, 117 (Tex. Crim. App. 2006); State v. Mason, 162 P.3d 396, 403-05 (Wash. 2007); State v. Mechling, 633 S.E.2d 311, 325-26 (W. Va. 2006); State v. Jensen, 727 N.W.2d 518, 529-36 (Wis. 2007).

[43] *See* FED. R. EVID. 804(b)(6).

[44] *See id.*; CAL. EVID. CODE § 1350; DEL. R. EVID. 804(b)(6); HAW. R. EVID. 804(b)(7); KY. R. EVID. 804(b)(5); MD. R. 5-804(b)(5); MD. CODE ANN., CTS. & JUD. PROC. § 10-901 (2007); MICH. R. EVID. 804(b)(6); N.D. R. EVID. 804(b)(6); OHIO R. EVID. 804(b)(6); OR. REV. STAT. ANN. § 40.465 (2007); PA. R. EVID. 804(b)(6); TENN. R. EVID. 804(b)(6); VT. R. EVID. 804(b)(6).

[45] This observation treats the federal courts as just one jurisdiction, since there is now a rule that applies in all federal courts.

[46] *See supra* notes 34-38. These jurisdictions are: Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Vermont, Washington, West Virginia, the District of Columbia, and Wisconsin.

wrongdoing in at least some form.[47] In light of this pervasive adoption of the principle of forfeiture by wrongdoing, it can be concluded that it is now the majority position to recognize the principle's legitimacy.

The breadth of analysis that forfeiture by wrongdoing has received also has produced disparate conclusions about not only the specific contents of the rule of forfeiture by wrongdoing, but also about when the rule should apply, how broadly the rule should apply, and whether forfeiture by wrongdoing addresses hearsay as well as constitutional objections. This part of the article surveys the divergent conclusions jurisdictions have reached regarding all of these issues. This survey will also substantially furnish the constituent premises of the subsequent part's arguments about what forfeiture by wrongdoing should look like in Florida.

A. What's in a Name? Forfeiting or Waiving—A Rose Would Not Smell as Sweet by any Other Name

Of the thirty-three jurisdictions[48] that have addressed forfeiture by wrongdoing, five jurisdictions have analyzed whether to use the term forfeiture or waiver.[49] No jurisdiction has, after analysis, rejected the term forfeiture.[50] Four jurisdictions have not used the term forfeiture,

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[47] *See*, *e.g.*, *Edwards*, 830 N.E.2d at 166-67.

[48] *See supra* note 46. This number again treats all of the federal courts as one jurisdiction.

[49] The federal adoption of Federal Rule of Evidence 804(b)(6) reflects a preference for the use of "forfeiture." FED. R. EVID. 804(b)(6). The GAP report regarding the 1997 adoption of the Federal Rule of Evidence 804(b)(6) states that the title of 804(b)(6) was changed to "forfeiture by wrongdoing" but does not indicate what this change was from. FED. R. EVID. 804(b)(6) GAP report. The report also states that "waiver" was replaced by "forfeiture" in the committee's note. *Id.* However, neither the GAP report nor the committee note gives any analysis as to why "forfeiture" was the preferred term. *See id.*; FED. R. EVID. 804(b)(6) advisory committee's note. Because of this absence of explanation, the federal adoption of forfeiture by wrongdoing has not been included in the total number of jurisdictions to analyze whether to use "forfeiture" or "waiver." The GAP report for FED. R. EVID. 804(b)(6) can be found at http://www.law.cornell.edu/rules/fre/ACRule804.htm. *See also* People v. Giles, 152 P.3d 433, 144-45 (Cal. 2007); State v. Hallum, 606 N.W.2d 351, 354 (Iowa 2000); Commonwealth v. Edwards, 830 N.E.2d 158, 168 n.16 (Mass. 2005); State v. Mason, 162 P.3d 396, 404 (Wash 2007).

[50] *Supra* note 49.

but there is no indication in any of the opinions from those jurisdictions that the use of the term waiver was indicative of a conclusion that forfeiture was an inappropriate term to use.[51] It is therefore the uniform position of jurisdictions that have considered the question to use the term forfeiture.

Forfeiture has been preferred because the term "better reflects the legal principles that underpin the doctrine."[52] The principle that underpins forfeiture by wrongdoing is equity: "the notion that people cannot complain of the natural and generally intended consequences of their actions."[53] When Ohio chose to codify the principle of forfeiture by wrongdoing, forfeiture was used because the drafters wanted to explicitly disclaim that the analysis of the loss of the right to confrontation and hearsay protections was not to be analogized to the voluntary relinquishment of a known right (such as the right to jury trial).[54] The New York Court of Appeals similarly recognized that forfeiture is the more appropriate term because that word is more in accord with the equitable nature of forfeiture by wrongdoing; and that waiver analysis, which is applied to other rights that can be voluntarily waived, is inapposite.[55] The Iowa Supreme Court, as a threshold issue when considering whether to adopt forfeiture by wrongdoing, decided whether to use the term forfeiture or waiver.[56] The court thought that this was important because it would dictate which analysis was most appropriate.[57] The court defined waiver as "an intentional relinquishment of a known right" and forfeiture as "the loss of a right as a result of misconduct . . .

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[51] *See* State v. Valencia, 924 P.2d 497, 501-04 (Ariz. Ct. App. 1996); State v. Henry, 820 A.2d 1076, 1085-90 (Conn. App. Ct. 2003); State v. Warford, 389 N.W.2d 575, 580-81 (Neb. 1986); State v. Sheppard, 484 A.2d 1330, 1345-49 (N.J. Super. Ct. Law Div. 1984). None of these jurisdictions has a codification of forfeiture by wrongdoing.

[52] *Edwards*, 830 N.E.2d at 168 n.16.

[53] State v. Mason, 162 P.3d 396, 404 (Wash. 2007).

[54] *See* OHIO R. EVID. 804(B)(6) staff notes; *see also* People v. Baca, No. E032929, 2004 WL 2750083, at *12 (Cal. Ct. App. Dec. 2, 2004) ("As a forfeiture, there is no need to prove an intelligent relinquishment of a known right.").

[55] People v. Geraci, 649 N.E.2d 817, 821 (N.Y. 1995).

[56] State v. Hallum, 606 N.W.2d 351, 354-55 (Iowa 2000).

[57] *Id.* at 354. The unstated premise of this conclusion is that the court needed to properly categorize this legal theory so that it could draw upon the appropriate precedent when deciding how to craft and interpret the rule of forfeiture by wrongdoing.

irrespective of whether the defendant intended to relinquish the right."[58] Forfeiture was to be treated as a penalty for the defendant's wrongdoing (that is, making the witness unavailable).[59] Ultimately, the court concluded that because forfeiture by wrongdoing was intended to act as a penalty that equitably punishes a party's wrongdoing, rather than as a relinquishment of a right that a party knew that it had, forfeiture was the more appropriate framework and word to use.[60] It is also noteworthy that none of the thirteen jurisdictions that have codified forfeiture by wrongdoing used the term waiver, but instead they generally used the term forfeiture.[61]

It is not just the state courts that have used the term forfeiture, to the exclusion of waiver, when describing forfeiture by wrongdoing. Justice Scalia, authoring the majority opinions in both *Davis v. Washington* and *Crawford v. Washington*, used the term forfeiture when writing that the United States Supreme Court recognized the legitimacy of the principle.[62] Justice Scalia did not use the term waiver at all, despite the fact that there were published decisions using the term waiver at the time that both *Davis* and *Crawford* were written.[63] The use of the term forfeiture by the same Justice that wrote both of the most recent United States Supreme Court opinions mentioning forfeiture by wrongdoing impliedly gives the Supreme Court's imprimatur to the term forfeiture.[64]

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[58] *Id.* at 354-55 (internal quotations omitted). The Supreme Court of Iowa also relied on Webster's Third New International Dictionary when defining "forfeiture." *See id.* at 355.

[59] *See id.* at 355.

[60] *Id.* at 354-55.

[61] *See supra* nn.36-37. The author uses the term "generally" because California, Maryland, Michigan, and Oregon used neither "forfeiture" nor "waiver." *See* CAL. EVID. CODE § 1350; MD. R. 5-804(b)(5); MD. CODE ANN., CTS. & JUD. PROC. § 10-901 (2007); MICH. R. EVID. 804(b)(6); OR. REV. STAT. ANN. § 40.465 (2007).

[62] Davis v. Washington, 547 U.S. 813, 833 (2006); Crawford v. Washington, 541 U.S. 36, 62 (2004).

[63] *See* State v. Valencia, 924 P.2d 497, 498 (Ariz. Ct. App. 1996); *see also* State v. Henry, 820 A.2d 1076, 1081 (Conn. Ct. App. 2002).

[64] *See* People v. Giles, 152 P.3d 433, 442 (Cal. 2007), *cert. granted*, Giles v. California, 128 S. Ct. 976 (2008) (mem.).

B. What's in a Name? Wrongdoing or Misconduct—This Rose May Still Smell Just As Sweet by Any Other Name

Of the thirty-three jurisdictions[65] that have addressed forfeiture by wrongdoing, none of them have analyzed whether to use the term wrongdoing or misconduct. However, some noteworthy patterns can be found by examining the number of jurisdictions that have used each term. In addition to the *Federal Rules of Evidence*,[66] twenty-two states have used only the term wrongdoing.[67] Five state courts have used only misconduct.[68] Three states have used both wrongdoing and misconduct.[69] Excluding California,[70] all thirteen jurisdictions that have codified forfeiture by wrongdoing did so by using the term wrongdoing.[71]

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[65] *See supra* note 46. This number treats the federal courts as one jurisdiction.

[66] FED. R. EVID. 804(b)(6).

[67] *See* DEL. R. EVID. 804(b)(6); HAW. R. EVID. 804(b)(7); KY. R. EVID. 804(b)(5); MD. CODE ANN., CTS. & JUD. PROC. § 10-901 (2007); MD. R. EVID. 5-804(b)(5); MICH. R. EVID. 804(b)(6); N.D. R. EVID. 804(b)(6); OHIO R. EVID. 804(b)(6); OR. REV. STAT. ANN. § 40.465(3)(g) (2007); PA. R. EVID. 804(b)(6); TENN. R. EVID. 804(b)(6); VT. R. EVID. 804(b)(6); *Giles*, 152 P.3d at 438; People v. Stechly, 870 N.E.2d 333, 348-54 (Ill. 2007); Commonwealth v. Edwards, 830 N.E.2d 158, 162 (Mass. 2005); State v. Caulfield, 722 N.W.2d 304, 311-12 (Minn. 2006); State v. Mizenko, 127 P.3d 458, 470 n.2 (Mont. 2006); State v. Lewis, 619 S.E.2d 830, 846 (N.C. 2005), *aff'd as modified by* State v. Lewis, 648 S.E.2d 824, 830 (N.C. 2007); State v. Romero, 156 P.3d 694, 701-03 (N.M. 2007); State v. Page, 104 P.3d 616, 621 (Or. 2005); Gonzalez v. State, 195 S.W.3d 114, 117 (Tex. Crim. App. 2006); State v. Mason, 162 P.3d 396, 403-04 (Wash. 2007); State v. Mechling, 633 S.E.2d 311, 325-26 (W. Va. 2006); State v. Jensen, 727 N.W.2d 518, 521, 529-36 (Wis. 2007).

[68] *See Valencia*, 924 P.2d at 502; Vasquez v. People, 173 P.3d 1099, 1104-05 (Colo. 2007); *Henry*, 820 A.2d at 1082-90; Devonshire v. United States, 691 A.2d 165, 168 (D.C. 1997); State v. Magouirk, 561 So. 2d 801, 806 (La. Ct. App. 1990).

[69] *See* Hallum v. State, 606 N.W.2d 351, 356 (Iowa 2000). *Compare* State v. Gettings, 769 P.2d 25, 28-29 (Kan. 1989), *with* State v. Meeks, 88 P.3d 789, 794 (Kan. 2004); *compare* State v. Sheppard, 484 A.2d 1330, 1345-48 (N.J. Super. Ct. Law Div. 1984), *with* State v. Byrd, 923 A.2d 242, 250-52 (N.J. Super. Ct. App. Div. 2007).

[70] *See* CAL. EVID. CODE § 1350(a)(2)

[71] *See* FED. R. EVID. 804(b)(6); DEL. R. EVID. 804(b)(6); HAW. R. EVID. 804(b)(7); KY. R. EVID. 804(b)(5); MD. CODE ANN., CTS. & JUD. PROC. § 10-901 (2007); MD. R. EVID. 5-804(b)(5); MICH. R. EVID. 804(b)(6); N.D. R. EVID. 804(b)(6); OHIO R. EVID. 804(b)(6); OR. REV. STAT. ANN. § 40.465(3)(g) (2007); PA. R. EVID. 804(b)(6); TENN. R. EVID. 804(b)(6); VT. R. EVID. 804(b)(6).

There are two additional sources that may assist in obtaining an overall perspective regarding which term is used. First, the United States Supreme Court used only one term in both *Crawford* and *Davis*. Justice Scalia, in both opinions, only used only the term wrongdoing.[72] The second source is caselaw from United States courts of appeals, where the courts have used both wrongdoing and misconduct.[73] A review of older cases from the United States courts of appeals reveals that misconduct, like waiver, was used when the courts were relying on common law reasoning; wrongdoing, like forfeiture, became more commonly used once forfeiture by wrongdoing was codified in the *Federal Rules of Evidence*.[74]

The courts of appeals used misconduct because they were constrained by their use of common law reasoning and needed a term whose understanding was already in place in the common law. Misconduct fit the bill. The first forfeiture by wrongdoing case to use misconduct was *United States v. Mastrangelo*.[75] The *Mastrangelo* court quoted *Snyder v. Massachusetts*[76] to support its conclusion that a defendant could lose his or her confrontation right "at times even by misconduct."[77] Although *Snyder* did not deal with the principle of forfeiture by wrongdoing, it did involve a defendant acting less than appropriately.[78] Once this term was used in *Mastrangelo*, the courts needed to maintain use of the same word to describe the "bad act" so as to reinforce the precedential faithfulness of the opinions being written, as well as to clarify that the court was not changing the concept of what wrong was required. It is interesting, however, that *Reynolds* did not use the term misconduct at all. Rather, the *Reynolds* court spoke of "wrongful

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72 Davis v. Washington, 547 U.S. 813, 832 (2006); Crawford v. Washington, 541 U.S. 36, 62 (2004).

73 *Compare*, *e.g.*, United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996) ("[T]he law is settled that a defendant also may waive it through his intentional misconduct."), *with* United States v. Scott, 284 F.3d 758, 762 (7th Cir. 2002) ("To admit a statement against a defendant under the rule . . . the government must show (1) that the defendant engaged or acquiesced in wrongdoing . . . .").

74 *Compare Houlihan*, 92 F.3d at 1279 *with Scott*, 284 F.3d at 762.

75 United States v. Mastrangelo, 693 F.2d 269, 272 (2d Cir. 1982).

76 291 U.S. 97, 106 (1943).

77 693 F.2d at 272 (citing *Snyder*, 291 U.S. at 106).

78 *See Snyder*, 291 U.S. at 102-104.

procurement" and witnesses "wrongfully [being] kept away."[79] Nevertheless, since no court has analyzed which term to use, it cannot be said that there is a meaningful, well-reasoned majority position.[80]

C. The Need for Specific Intent

There is a much more active debate among jurisdictions and the scholarly legal community regarding whether a wrongdoer must have had some kind of specific intent in order for a forfeiture of confrontation or hearsay rights to occur.[81] The federal rule,[82] at least two federal courts using only the common law,[83] and eleven states[84] require some

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[79] Reynolds v. United States, 98 U.S. 145, 158-59 (1878).

[80] *See* discussion of what has been sufficient "wrongdoing" and "misconduct" *infra* Part IV. G.

[81] *See*, *e.g.*, People v. Giles, 152 P.3d 433, 441-42 (Cal. 2007), *cert. granted*, Giles v. California, 128 S. Ct. 976 (2008) (mem.) (recognizing the wide disagreement among jurisdictions); Gonzalez v. State, 195 S.W.3d 114, 120-21 (Tex. Crim. App. 2006) (noting the disagreement among courts regarding the specific intent requirement (citing John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L. REV. 835, 854, 875-77 (1996))). *Compare* Friedman, *supra* note 40, at 517-18 (arguing against the need for an "intent to silence" requirement) *with* Flanagan, *supra* note 40, at 891-93 (arguing that an "intent to silence" requirement is necessary).

[82] *See* FED. R. EVID. 804(b)(6).

[83] *See* United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996); United States v. Thevis, 665 F.2d 616, 630 (5th Cir. 1982), *superseded by statute on other grounds*, FED. R. EVID. 804(b)(6). *Houlihan* said that forfeiture by wrongdoing resulted in an extinguishment of hearsay and confrontation objections. *Houlihan*, 92 F.3d at 1281. The *Thevis* court admitted the statements under the residual hearsay exception. *Thevis*, 665 F.2d at 629-30. Because in both of these cases the confrontation right was held to be extinguished and the defendants needed to act with the partial intent of making the witness unavailable, a cogent inference can be made that each case was holding that the intent to silence was constitutionally required under the Sixth Amendment. The only federal court to explicitly disagree about this conclusion is the United States Court of Appeals for the Sixth Circuit. *See* United States v. Garcia-Meza, 403 F.3d 364, 370-71 (6th Cir. 2005) (finding that because "the Sixth Amendment does not depend on . . . 'the vagaries of the Rules of Evidence' " and that forfeiture by wrongdoing was an equitable doctrine and that an intent to silence was not constitutionally required (citing Crawford v. Washington, 541 U.S. 36, 61 (2004))). The other federal courts of appeals that have addressed forfeiture by wrongdoing have either assumed that Federal Rule of Evidence 804(b)(6) contains all constitutionally required elements or used the vague term "procure" and thus did not announce a rule that specifically required any kind of specific intent. *Compare* United States v. Dhinsa 243 F.3d 635, 653-54 (2d Cir. 2001) (equating FED. R. EVID.

kind of specific intent on the part of the wrongdoer in order for there to be a forfeiture of confrontation or hearsay objections. Five states and one federal court declined to require that the wrongdoer act with some kind of specific intent.[85] Twelve of the thirteen jurisdictions that have codified forfeiture by wrongdoing have included as part of the codified rule that the wrongdoer must have acted with the intent to make the

804(b)(6) with the preexisting circuit common law about forfeiture by wrongdoing), United States v. Gray, 405 F.3d 227, 240-41 (4th Cir. 2005), *and* United States v. Ochoa, 229 F.3d 631, 639 (7th Cir. 2000) (equating FED. R. EVID. 804(b)(6) with the constitutional rule regarding forfeiture by wrongdoing) *with* United States v. Mastrangelo, 693 F.2d 269, 272-73 (2d Cir. 1982) (requiring only a finding that the defendant was involved in absenting the witness), United States v. Carlson, 547 F.2d 1346, 1358 (8th Cir. 1976) (requiring a finding that the defendant procured the witness's absence), United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979), *overruled on other grounds by* United States v. Willis, 102 F.3d 1078 (10th Cir. 1996), *and* United States v. White, 116 F.3d 903, 911 (D.C. Cir. 1997). Notable exceptions to this scheme are the cases involving forfeiture of confrontation and hearsay rights by co-conspirators; this instance has a unique rule. *See*, *e.g.*, United States v. Cherry, 217 F.3d 811, 818-20 (10th Cir. 2000).

[84] *See* CAL. EVID. CODE § 1350(a)(1) (requiring specific intent to forfeit hearsay objection); MD. CODE ANN., CTS. & JUD. PROC. § 10-901(a) (2007) (requiring specific intent to forfeit hearsay objection); MICH. R. EVID. 804(b)(6) (requiring specific intent to forfeit hearsay objection); Vasquez v. People, 173 P.2d 1099, 1104 (Colo. 2007) (requiring specific intent to forfeit Confrontation Clause objection); People v. Stechly, 870 N.E.2d 333, 349-53 (Ill. 2007) (requiring specific intent to forfeit Confrontation Clause objection); Commonwealth v. Edwards, 830 N.E.2d 158, 170 (Mass. 2005) (requiring specific intent to forfeit confrontation and hearsay objections); State v. Romero, 156 P.3d 694, 703 (N.M. 2007) (requiring specific intent to forfeit confrontation objection); People v. Geraci, 649 N.E.2d 817, 822-23 (N.Y. 1995) (requiring specific intent to forfeit confrontation and hearsay objections); State v. Hand, 840 N.E.2d 151, 170-72 (Ohio 2006) (requiring specific intent to forfeit confrontation and hearsay objections); Commonwealth v. Laich, 777 A.2d 1057, 1062 n.4 (Penn. 2001) (requiring specific intent to forfeit hearsay objections); State v. Ivy, 188 S.W.3d 132, 147-48 (Tenn. 2006) (requiring specific intent to forfeit confrontation and hearsay objection).

[85] *See* HAW. R. EVID. 804(b)(7); *Garcia-Meza*, 403 F.3d at 370 (not requiring specific intent to forfeit confrontation objection); People v. Giles, 152 P.3d 433, 443-44 (Cal. 2007), *cert. granted*, Giles v. California, 128 S. Ct. 976 (2008) (mem.) (not requiring specific intent to forfeit confrontation objection); People v. Bauder, 712 N.W.2d 506, 514-15 (Mich. Ct. App. 2006) (not requiring specific intent to forfeit confrontation objection); State v. Mason, 162 P.3d 396, 404 (Wash. 2007) (not requiring specific intent to forfeit confrontation objection); State v. Jensen, 727 N.W.2d 518, 534-35 (Wis. 2007) (not requiring specific intent to forfeit confrontation objection).

witness unavailable.[86] It therefore appears to be the majority position to require some kind of specific intent; however, as discussed below, the rationale for why a specific intent is required varies widely.

Although a majority of jurisdictions require a defendant to have had some intent to silence a witness in order for forfeiture to occur, there is sparse judicial analysis about why specific intent should be required. Two main arguments emerge when caselaw is reviewed. First, there is the argument that stems from the use of a waiver[87] framework. An example of this is Judge Selya's analysis of a situation where a defendant objected to the use of forfeiture by wrongdoing to admit hearsay statements of a murdered person.[88] Judge Selya was working only with the common law and used the term waiver when describing forfeiture by wrongdoing.[89] In order for a right to be waived, such as the right to counsel, the party waiving that right must knowingly and voluntarily decide to forgo that right.[90] The waiver is voluntary only if the party effecting the waiver knows of the right that is being waived.[91] Therefore, judges relying only upon the common law, like Judge Selya, were required to craft the contours of forfeiture by wrongdoing so that analogizing it to a waiver could be faithfully accomplished.[92] Accordingly, Judge Selya, like other judges that relied upon only the common law, employed the legal fiction of notice when describing how forfei-

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[86] *See* FED. R. EVID. 804(b)(6); CAL. EVID. CODE § 1350(a)(1); MD. CODE ANN., CTS. & JUD. PROC. § 10-901(a) (2007); DEL. R. EVID. 804(b)(6); KY. R. EVID. 804(b)(5); MICH. R. EVID. 804(b)(6); N.D. R. EVID. 804(b)(6); OHIO R. EVID. 804(b)(6); PA. R. EVID. 804(b)(6); TENN. R. EVID. 804(b)(6); VT. R. EVID. 804(b)(6). The glaring exception to this is Hawaii. *See* HAW. R. EVID. 804(b)(7). Another notable exception is Oregon, which requires an intent to silence only when a defendant performs a noncriminal action that causes a witness's unavailability. *Compare* OR. REV. STAT. ANN. § 40.465(3)(g) (2007) *with* § 40.465(3)(f). Each of these codifications only forfeits hearsay objections.

[87] *See Houlihan.* 92 F.3d at 1278.

[88] *See id.* at 1278.

[89] *See id.* at 1279.

[90] *See*, *e.g.*, Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[91] *See id.*

[92] *See Houlihan*, 92 F.3d at 1280; *see also* United States v. Carlson 547 F.2d 1346, 1358-59 (8th Cir. 1976); State v. Romero 156 P.3d 694, 702 (N.M. 2007) ("[W]e believe the emphasis must be not only on wrongdoing but on intentional wrongdoing, from which an inference of waiver might be appropriate . . . .").

ture by wrongdoing would work. As Judge Selya observed "it is the intent to silence that provides notice."[93]

A second justification that has been advanced for requiring that forfeiture by wrongdoing have an intent to silence element is that this requirement ensures that the purpose of the rule is served when applied.[94] This perspective is rooted in forfeiture by wrongdoing's source being equity—that the law will not countenance an unjust action.[95] Specifically, it has been argued that if a party makes a witness unavailable without the intent to silence that witness, then there is no transgression against the justice system and accordingly no reason to punish the opposing party, who would otherwise have a confrontation or hearsay objection.[96] Stated differently, if a defendant did not act with the intent to make a witness unavailable, then forfeiture by wrongdoing could not have acted as a deterrent to him or her—there is no wrong to punish or correct.[97] What would result is a windfall for the government at the expense of a fundamental right whenever a defendant makes a witness unavailable regardless of the defendant's motive.

The minority position is that forfeiture by wrongdoing does not require any specific intent; the wrongdoer forfeits his or her objection simply by making the witness unavailable.[98] Some courts have reached this conclusion against the backdrop of a codified forfeiture by wrongdoing rule that requires intent, whereas others have reached this conclusion based on the common law alone. The United States Court of Appeals for the Sixth Circuit is an example of the former. In 2005, the court decided that although section 804(b)(6) of the *Federal Rules of Evidence* had an "intent to silence" requirement, this was not constitu-

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

94 *See* State v. Alvarez-Lopez, 98 P.3d 699, 705 (N.M. 2004).

95 *See* Crawford v. Washington, 541 U.S 36, 62 (2004) ("[F]orfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds . . . ."); *see also* Reynolds v. United States, 98 U.S. 145, 159 (1878) ("[N]o one shall be permitted to take advantage of his own wrong . . . .").

96 *See Alvarez-Lopez*, 98 P.3d at 705.

97 *See* People v. Stechly, 870 N.E.2d 333, 349 (Ill. 2007) ("It is . . . impossible to deter those who do not act intentionally.").

98 *See, e.g.*, People v. Giles 152 P.3d 433, 446 (Cal. 2007), *cert. granted*, Giles v. California, 128 S. Ct. 976 (2008) (mem.).

tionally required; the Confrontation Clause required no such intent.[99] The court found support in the Supreme Court's opinion in *Crawford*,[100] which read in part: "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence . . . ."[101] The court found additional support in the Supreme Court's recent affirmation of forfeiture by wrongdoing as an "essentially equitable" rule.[102] The Sixth Circuit articulated that a defendant should not benefit at all from making a witness unavailable, regardless of the defendant's motivation to make the witness unavailable.[103] California similarly determined that the Sixth Amendment did not require that the government prove that a wrongdoer intended to silence a witness.[104] The California Supreme Court emphasized the equitable nature of forfeiture by wrongdoing and the fact that the rule existed to enable courts to maintain their truth-finding integrity.[105]

Texas and Washington, acting without a codification of forfeiture by wrongdoing, have in post-*Crawford* decisions both decided that forfeiture by wrongdoing does not require an intent to silence.[106] In

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[99] United States v. Garcia-Meza, 403 F.3d 364, 370 (6th Cir. 2005).

[100] *See id.*

[101] Crawford v. Washington, 541 U.S. 36, 61 (2004). The use of this quotation for the ascribed purpose in G*arcia-Meza* has been criticized as taking the quotation out of context. *See Stechly*, 870 N.E.2d at 350-51 (arguing that this quotation does not apply to forfeiture by wrongdoing because the Court was addressing the failure of Roberts to address reliability). *See also* discussion *infra* Part IV.C.

[102] *See Garcia-Meza*, 403 F.3d at 370 (quoting *Crawford*, 541 U.S. at 61) (internal quotations omitted).

[103] *See id.* at 370-71.

[104] *See* People v. Giles, 152 P.3d 433, 443 (Cal. 2007), *cert. granted*, Giles v. California, 128 S. Ct. 976 (2008) (mem.). The court went on to also state that the applicable burden of proof was "preponderance of the evidence" despite the California Legislature's having already stated that "clear and convincing evidence" is the appropriate burden of proof for forfeiture by wrongdoing analysis under the hearsay statute. *Id*. at 446 nn.7-8.

[105] *See id*. at 438-43.

[106] *See* Gonzalez v. State, 155 S.W.3d 603, 610-11 (Tex. Crim. App. 2004); State v. Mason, 162 P.3d 396, 404 (Wash. 2007). It is noteworthy that although an "intent to silence" is the prevailing law in New Mexico, recently an intermediate appellate court in New Mexico suggested that its supreme court's adoption of an "intent to silence" requirement was inappropriate and the result of not having been fully briefed and cognizant of all of the arguments. *See* State v. Romero, 133 P.3d 842, 852-54 (N.M.

making this decision, these states also concentrated on the equitable grounding of forfeiture by wrongdoing. The Washington Supreme Court, stating that equity is "the notion that people cannot complain of the natural and generally intended consequences of their actions," found that an intent to silence was unnecessary because "[k]nowledge that the foreseeable consequences of one's actions include a witness' unavailability at trial" was adequate.[107] The Texas Court of Appeals based its decision on the premise that excluding hearsay on the basis that the witness was unavailable will benefit the defendant regardless of the defendant's motivation to make the witness unavailable and that this benefit is unjust.[108]

All of the decisions mentioned in the previous two paragraphs are post-*Crawford*. However, there is actually a mixed understanding among the courts of the import of *Crawford* and *Davis* on the requirement of the intent to silence.[109] Some courts have interpreted the Supreme Court's statement in *Davis*, that section 804(b)(6) of the *Federal Rules of Evidence* codified forfeiture by wrongdoing, to intimate that there must be an intent to silence requirement since section 804(b)(6) has this requirement.[110] Some courts have relied upon the emphasis in the *Crawford* and *Davis* opinions on preventing defendants from interfering with the justice system, concluding that an intent to silence must be part of the rule of forfeiture by wrongdoing.[111] At the other end of the spectrum are courts that found *Crawford* and *Davis* to not require

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2006). This court went on to conclude that an "intent to silence" was not required by the Sixth Amendment. *See id*.

[107] *Mason*, 162 P.3d at 404. This suggestion was recently rejected in *Romero*. State v. Romero, 156 P.3d 694, 702 (N.M. 2007).

[108] *See Gonzalez*, 155 S.W.3d at 610-11. The Court of Criminal Appeals in Texas, granting review of this decision, explicitly reserved judgment on the issue of whether forfeiture by wrongdoing required an "intent to silence" because, even if it did, that had been proven in this case. *See* Gonzalez v. State, 195 S.W.3d 114, 124-25 (Tex. Crim. App. 2006).

[109] *See Gonzalez*, 195 S.W.3d at 120-21 (recognizing the disparity in application of forfeiture by wrongdoing post-*Crawford*).

[110] *See* People v. Stechly, 870 N.E.2d 333, 350-51 (Ill. 2007) (finding an identity between the constitutional doctrine and FED. R. EVID. 804(b)(6) based on *Davis*); *see also* State v. Alvarez-Lopez, 98 P.3d 699, 704 (N.M. 2004) (finding, without reliance on *Crawford* or *Davis*, that FED. R. EVID. 804(b)(6) represents the minimal constitutional requirements because the rule was intended to be a codification).

[111] *See Romero*, 133 P.3d at 850.

any kind of intent to silence because both *Crawford* and *Davis* affirmed the equitable basis for forfeiture by wrongdoing.[112] One legal scholar has argued that *Crawford*'s reinterpretation of the Confrontation Clause, as well as how it intersects with hearsay law, has been the impetus for many courts expanding forfeiture by wrongdoing.[113]

Even if courts were to look beyond *Crawford* and *Davis*, there still would be divergent interpretations about what the United States Supreme Court has said about forfeiture by wrongdoing. Whether *Reynolds* has an intent to silence requirement is also disputed among courts. Some courts have concluded that the rule announced in *Reynolds* did not contain an intent to silence requirement.[114] Some courts have read *Reynolds* more narrowly, arguing that application of the *Reynolds* rule indicates forfeiture by wrongdoing must contain an intent to silence element.[115]

In jurisdictions that have concluded that a wrongdoer must have the intent to silence a witness when he or she makes the witness unavailable, there is nearly complete uniformity regarding the kind of specific intent required. No jurisdiction requires the defendant's wrongdoing to have been solely, or even predominantly, motivated by making the witness unavailable. Each jurisdiction that has considered the question has required that the wrongdoer be motivated only in part by a desire to silence the witness.[116] Some courts have even explicitly

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[112] *See* United States v. Garcia-Meza, 403 F.3d 364, 369-70 (6th Cir. 2005); People v. Giles, 152 P.3d 433, 442-43 (Cal. 2007); State v. Jensen, 727 N.W.2d 518, 534-35 (Wis. 2007) (approving of *Garcia-Meza*'s understanding of *Crawford* and *Davis*).

[113] *See*, *e.g.*, Flanagan, *supra* note 40, at 1196-99 (criticizing the observed post-*Crawford* expansion of forfeiture by wrongdoing); *see also* Flanagan, *supra* note 40, at 875-78 (explaining post-*Crawford* case development).

[114] *See Giles*, 152 P.3d at 438 ("Notably, in describing the rule, the [*Reynolds*] court did not suggest that the rule's applicability hinged on Reynolds's purpose or motivation . . . ").

[115] *See Stechly*, 870 N.E.2d at 349-50; *see also* Flanagan, *supra* note 40, at 1196 (arguing that *Reynolds* can only be understood as a narrowly construed opinion).

[116] *See*, *e.g.*, United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996) ("[I]t is sufficient in this regard to show that the evildoer was motivated *in part* by a desire to silence the witness; the intent to deprive the prosecution of testimony need not be the actor's *sole* motivation."); State v. Alvarez-Lopez, 98 P.3d 699, 704 (N.M. 2004).

stated that the intent to silence may be inferred based on the circumstances of the wrong alone.[117]

Related to the arguments about whether forfeiture by wrongdoing must contain an intent to silence element are the arguments regarding limiting the subject matter of the hearsay rendered admissible through forfeiture by wrongdoing. The subject matter argument is related to the intent to silence argument because it has been raised in the same context in which the intent to silence arguments have often been made; when defendants are on trial for the murder of an unavailable witness that they are claiming they have a right to confront.[118] In each case where this argument has been raised, it has been rejected.[119] The courts have reasoned that incorporating a subject matter limit into forfeiture by wrongdoing would provide a complaining defendant with a benefit that he or she is not entitled to because the defendant has engaged in wrongdoing.[120]

D. Hearsay No More? Forfeiture of Hearsay Objections

There are three general approaches to the issue of whether a wrongdoer waives his or her hearsay objections when there is forfeiture by wrongdoing. In six jurisdictions a codified form of forfeiture by wrongdoing was already in existence by the time those jurisdictions first published an opinion addressing the issue. Those courts did not have to decide if forfeiture by wrongdoing waived both confrontation and hearsay objections.[121] If the court agreed that forfeiture by wrongdoing had

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[117] *See*, *e.g.*, People v. Geraci, 649 N.E.2d 817, 823 (N.Y. 1995).

[118] *See, e.g.,* United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999).

[119] *See, e.g., id.*

[120] *See* United States v. Gray, 405 F.3d 227, 241 (4th Cir. 2005); United States v. Dhinsa, 243 F.3d 635, 652-53 (2d Cir. 2001); *Emery*, 186 F.3d at 926. Each of the federal courts relied upon FED. R. EVID. 804(b)(6) in coming to its conclusion, and Tennessee relied upon its nearly identical codification of the federal rule. *See* State v. Ivy, 188 S.W. 3d 132, 147 (Tenn. 2006); *see also* State v. Jensen, 727 N.W.2d 518, 532-35 (Wis. 2007) (approving *Emery*'s rejection of a subject matter limitation and finding that a broad interpretation of forfeiture by wrongdoing is appropriate post-Crawford).

[121] *See*, *e.g.*, United States v. Garcia-Meza, 403 F.3d 364 (6th Cir. 2005); United States v. Johnson, 219 F.3d 349 (4th Cir. 2000); United States v. Ochoa, 229 F.3d 631 (7th Cir. 2000); People v. Bauder, 712 N.W.2d 506 (Mich. Ct. App. 2006); State v. Hand, 840 N.E.2d 151 (Ohio 2006); State v. Ivy, 188 S.W.3d 132 (Tenn. 2006).

been proven to the appropriate degree, then the rules of evidence provided for a hearsay exception.

Nine of the ten jurisdictions to address forfeiture by wrongdoing without an existing codification all held that forfeiture by wrongdoing works as a forfeiture of both the Confrontation Clause and hearsay claims.[122] One argument for the forfeiture of hearsay objections in addition to Confrontation Clause objections is that equity requires this forfeiture; the wrongdoer should not be able to complain of the lack of a live witness when he has caused that live witness's absence.[123] Another argument is rooted in an understanding that although the Confrontation Clause and hearsay law protect different interests, they are nonetheless closely related. The Fifth Circuit explained in *Thevis* that hearsay objections may be waived through forfeiture by wrongdoing because forfeiture by wrongdoing obviates the defendant's interest in confrontation and therefore leaves the admissibility of reliable evidence as the only important factor.[124] The First Circuit, agreeing that the Confrontation Clause and hearsay rules protect different interests, understood the interplay differently. The court said that they both "husband essentially the same interests" when they try to "strike a balance between the government's need for probative evidence and the defendant's stake in testing the government's case through cross-examination."[125] When the interests protected by hearsay rules and the Confrontation Clause are removed from the balance because of a defendant's wrongdoing, then

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[122] *See* United States v. White, 116 F.3d 903, 912 (D.C. Cir. 1997); United States v. Houlihan, 92 F.3d 1271, 1281-82 (1st Cir. 1996); United States v. Mastrangelo, 693 F.2d 269, 272 (2d Cir. 1982); United States v. Thevis, 665 F.2d 616, 632-33 (5th Cir. 1982), *superseded by statute on other grounds*, FED. R. EVID. 804(b)(6); United States v. Balano, 618 F.2d 624, 626 (10th Cir. 1979), *overruled on other grounds by* United States v. Willis, 102 F.3d 1078 (10th Cir. 1996); State v. Valencia, 924 P.2d 497, 502 (Ariz. 1996); Devonshire v. United States, 691 A.2d 165, 165-69 (D.C. 1997); State v. Hallum, 606 N.W.2d 351, 356 (Iowa 2000); Commonwealth v. Edwards, 830 N.E.2d 158, 170 (Mass. 2005); *Geraci*, 649 N.E.2d at 821.

[123] *See White*, 116 F.3d at 912; s*ee also* People v. Bosier, 847 N.E.2d 1158, 1160-61 (N.Y. 2006) (explaining that holding that forfeiture by wrongdoing forfeits confrontation and hearsay objections furthers the deterrent purpose of forfeiture by wrongdoing); People v. Cotto, 642 N.Y.S.2d 790, 793 (N.Y. Sup. Ct. 1996).

[124] *See Thevis*, 665 F.2d at 632-33; s*ee also Devonshire*, 691 A.2d at 168-69.

[125] *Houlihan*, 92 F.3d at 1281.

the scale must tip in favor of the government.[126] Although there are disparate justifications for the forfeiture of hearsay and confrontation objections, it is nonetheless apparent that the majority rule is that a defendant forfeits both hearsay and Confrontation Clause objections through forfeiture by wrongdoing.[127]

The sole court to explicitly disagree with the majority position is the Supreme Court of Colorado.[128] The court overruled the lower appellate court's decision and reasoning regarding forfeiture by wrongdoing effecting a waiver of hearsay objections.[129] The lower appellate court reasoned that the majority view was more persuasive because of the equitable nature of forfeiture by wrongdoing as well as the understanding that the Confrontation Clause and the hearsay rules protect much of the same interests.[130] The Supreme Court of Colorado reversed that decision, primarily based on the lower appellate court's failure to appreciate the presumptive unreliability of hearsay.[131] Thus, the Supreme Court of Colorado requires that the government find an already existing hearsay exception for the testimony of an unavailable declarant, even when then the defendant has forfeited his Confrontation Clause objection.[132]

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126 *Id*. Judge Selya also included that "English and American courts have consistently relaxed the hearsay rule when the defendant wrongfully causes the witness' unavailability." *Id*. (quoting Steele v. Taylor, 684 F.2d 1193, 1201 (6th Cir. 1982)).

127 *See White*, 116 F.3d at 912 (recognizing that this is the majority position); *Edwards*, 830 N.E.2d at 170 n.22. Although Iowa and Arizona have adopted this position, there are no reported decisions analyzing this specific issue. *See Hallum*, 606 N.W.2d at 356; *Valencia*, 924 P.2d at 502.

128 *See* Vasquez v. People, 173 P.3d 1099, 1101 (Colo. 2007) (holding that "the doctrine of forfeiture by wrongdoing does not preclude hearsay objections under the Colorado Rules of Evidence.").

129 *Id.*

130 People v. Vasquez, 155 P.3d 565, 569 (Colo. Ct. App. 2006).

131 *See Vasquez*, 173 P. 3d at 1106.

132 *See id.* Colorado does, however, have a residual hearsay exception. *See* COLO. R. EVID. 807. It is also noteworthy that two federal courts, relying only on common law forfeiture by wrongdoing when addressing a Confrontation Clause claim, admitted the hearsay statements under the residual hearsay exception in the Federal Rules of Evidence. *See* United States v. Rouco, 765 F.2d 983, 994-95 (11th Cir. 1985); United States v. Carlson, 547 F.2d 1346, 1352-60 (8th Cir. 1977). In each of these opinions, the courts did not analyze whether forfeiture by wrongdoing under the common law forfeited the defendant's hearsay objection. Rather, the courts first analyzed the

E. More Than a Preponderance—The Number of Jurisdictions Supporting That Standard of Proof

Fourteen jurisdictions (the federal courts and thirteen states) have all agreed that the government must prove the elements of forfeiture by wrongdoing by a preponderance of the evidence.[133] Of these thirteen states, only three of them had codified versions of forfeiture by wrongdoing at the time their courts ruled that preponderance of the evidence was the appropriate standard.[134] Also noteworthy is that four of the five United States courts of appeals that addressed forfeiture by wrongdoing while relying only on the common law concluded that pre-

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hearsay objection and, upon concluding that the hearsay was properly admitted, addressed the Confrontation Clause objection. *See Rouco*, 765 F.2d at 994-95; *see also Carlson*, 547 F.2d at 1353-60. This approach was logical if the courts analytically saw the hearsay objection as preceding the constitutional claim, which is consistent with courts generally refraining from reaching constitutional claims if it is not necessary to resolve the constitutional issue. Nonetheless, because of the order of analysis employed it is unknown if the courts considered the question of whether forfeiture by wrongdoing forfeited both confrontation and hearsay objections. It could also be argued that Minnesota does agree with the proposition that forfeiture by wrongdoing only forfeits objections based on the Confrontation Clause. *See* State v. Turner, No. A04-1799, 2005 WL 2850315, at *3-*4 (Minn. Ct. App. Nov. 1, 2005) (finding it necessary to admit hearsay based on a residual hearsay exception where defendant had forfeited his Confrontation right through wrongdoing). *But see* State v. Keeton, 573 N.W.2d 378, 382-383 (Minn. Court of Appeals 1997) (finding that a defendant forfeits both confrontation and hearsay objections through forfeiture by wrongdoing), *rev'd,* State v. Keeton, 589 N.W.2d 85 (Minn. 1998) (reversing the lower appellate court's decision about whether the hearsay was admissible, but not addressing the lower appellate court's analysis of forfeiture by wrongdoing).

[133] *See* FED. R. EVID. 804(b)(6) advisory committee's note to 1997 amendments; *Valencia*, 924 P.2d at 502; *Vasquez*, 173 P.3d at 1105; Devonshire v. United States, 691 A.2d 165, 169 (D.C. 1997); People v. Stechly, 870 N.E.2d 333, 353 (Ill. 2007); *Hallum*, 606 N.W.2d at 355-56; State v. Gettings, 769 P.2d 25, 29 (Kan. 1989); Commonwealth v. Edwards, 830 N.E.2d 158, 172-73 (Mass. 2005); People v. Jones, 714 N.W.2d 362, 368-69 (Mich. Ct. App. 2006); State v. Sheppard, 484 A.2d 1330, 1348 (N.J. Super. Ct. Law Div. 1984); State v. Hand, 840 N.E.2d 151, 172 (Ohio 2006); State v. Ivy, 188 S.W.3d 132, 147 (Tenn. 2006); State v. Jensen, 727 N.W.2d 518, 535-36 (Wis. 2007) (recognizing that preponderance of the evidence is the majority position).

[134] *See Jones*, 714 N.W.2d at 368-69; *Hand*, 840 N.E.2d at 172; *Ivy*, 188 S.W.3d at 147.

ponderance of the evidence was the appropriate standard of proof.[135] Currently, only three jurisdictions have disagreed and concluded that a higher burden of proof, clear and convincing evidence, is appropriate.[136]

In general, three arguments have been advanced in support of the majority position regarding the appropriate burden of proof. Courts have relied upon one, all, or some combination of them. One argument is that asking the trial court to rule on whether hearsay is admissible because of forfeiture by wrongdoing is like asking the trial court to rule on any other pretrial evidentiary matter, and can accordingly be decided with the same standard of proof: preponderance of the evidence.[137]

A second argument looks to the reason that forfeiture by wrongdoing is an accepted legal principle. Forfeiture by wrongdoing is used as a disincentive for defendants to engage in witness tampering.[138] Correspondingly, the more likely that forfeiture by wrongdoing can be applied, the greater the deterrent value.[139] This justification is included, for example, in the advisory committee note to the 1997 adoption of

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135 *See* United States v. White, 116 F.3d 903, 911-12 (D.C. Cir. 1997); United States v. Houlihan, 92 F.3d 1271, 1280 (1st Cir. 1996); United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1980), *overruled on other grounds by* United States v. Willis, 102 F.3d 1078 (10th Cir. 1996). The exception is United States v. Thevis, 665 F.2d 616, 630-31 (5th Cir. 1982), *superseded by statute on other grounds*, FED. R. EVID. 804(b)(6).

136 *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-901 (2007); People v. Geraci, 649 N.E.2d 817, 821 (N.Y. 1995); State v. Mason, 162 P.3d 396, 404-05 (Wash. 2007); California is in a separate category regarding the burden of proof that the government is held to when it relies upon forfeiture by wrongdoing. By statue, the government must prove the required elements of forfeiture by wrongdoing by clear and convincing evidence in order to admit the intended testimony over a hearsay objection. *See* CAL. EVID. CODE § 1350(a)(1). However, the California Supreme Court decided that the Sixth Amendment did not require this burden of proof and instead adopted the preponderance of the evidence standard as the appropriate burden of proof to apply when evaluating whether a defendant's confrontation right is extinguished through forfeiture by wrongdoing. *See* People v. Giles, 152 P.3d 433, 445-46 (Cal. 2007), *cert. granted*, Giles v. California, 128 S. Ct. 976 (2008) (mem.).

137 *See*, *e.g.*, *Jones*, 714 N.W.2d at 368.

138 *See*, *e.g.*, *Devonshire*, 691 A.2d at 168-69.

139 *See Balano*, 618 F.2d at 629 ("[A] reasonable doubt standard for admission might well preclude a finding of waiver, no matter how reprehensible the defendant's conduct."); *see also Sheppard*, 484 A.2d at 1347-48 (finding that, because forfeiture by wrongdoing was distinct from the precepts of the Confrontation Clause, the same

Rule 804(b)(6) of the *Federal Rules of Evidence* which stated that preponderance of the evidence was used "in light of the behavior the new Rule 804(b)(6) seeks to discourage."[140]

Other courts have concluded that the analysis of forfeiture by wrongdoing can be most closely likened to the analysis used when courts consider whether statements by a co-conspirator can be admitted.[141] These courts deem the two analyses so similar that they have concluded that making a "forfeiture finding is the functional equivalent of the predicate factual finding that a court must make before admitting hearsay under the co-conspirator exception."[142] When a court considers whether to admit co-conspirator statements, the court must decide whether the defendant participated in a conspiracy and whether the statement was made in furtherance of the conspiracy; meaning that in cases where the defendant is charged with the crime of conspiracy the court must determine that the government has proven its whole case by a preponderance of the evidence.[143] In both situations, a court is making factual findings regarding whether the government has proven the entirety of its case.

The United States Court of Appeals for the Fifth Circuit stands out as the most notable federal opponent of using the preponderance of the evidence standard, instead favoring the clear and convincing evidence standard.[144] The *Thevis* court accepted the defendant's premise that the testing of evidence's reliability through confrontation was so integral to the functioning of the justice system that it should not easily be forfeited.[145] Accepting this premise led to the court's analogizing the forfeiture situation to cases where the reliability of evidence was con-

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burden of proof did not need to apply to a waiver of each); *Devonshire*, 691 A.2d at 169.

[140] FED. R. EVID. 804(b)(6) advisory committee's note to 1997 amendment.

[141] *See*, *e.g.*, *Devonshire*, 691 A.2d at 169.

[142] United States v. White, 116 F.3d 903, 912 (D.C. Cir. 1997); State v. Jensen, 727 N.W.2d 518, 536 (Wis. 2007) (citing *White*, 116 F.3d at 912).

[143] *See*, *e.g.*, *White*, 116 F.3d at 912 (citing Bourjaily v. United States, 483 U.S. 171, 175-76 (1987)).

[144] *See* United States v. Thevis, 665 F.2d 616, 631 (5th Cir. 1982), *superseded by statute on other grounds*, FED. R. EVID. 804(b)(6).

[145] *See id.* 665 F.2d at 631.

cerned, such as the use of tainted identifications.[146] The logical conclusion from these premises was that the court should require the government to prove the elements of forfeiture by wrongdoing by clear and convincing evidence because that would best guard against the admission of unreliable evidence.[147]

In its 1997 *White* opinion, the United States Court of Appeals for the District of Columbia Circuit specifically disputed the basic premise of the *Thevis* conclusion.[148] The *White* court, acknowledging that the *Thevis* court was correct in concluding that the Confrontation Clause is concerned with ensuring the reliability of evidence, stated "[i]t does not follow that every ruling on every related issue, even if it may expose the defendant to uncross-examined testimony, must rest on clear and convincing evidence."[149] The *White* court further observed incisively that giving the government a higher burden of proof does not affect the reliable quality of the evidence admitted, but rather only acts to reduce the breadth of forfeiture by wrongdoing's application.[150]

Other arguments against using the preponderance of the evidence standard, and in favor of using the clear and convincing evidence standard, are found in cases from New York and Washington.[151] In *Geraci*, the New York Court of Appeals recognized, like the *Thevis* court, that forfeiture by wrongdoing did not account for the reliability of the hearsay evidence that might be admitted though its application.[152] The *Geraci* court, however, used the additional maxim that "[t]he size of the margin of error that the law is willing to tolerate varies in inverse proportion to the importance to the party or to society of the issue to be resolved."[153] Thus, the *Geraci* court concluded that using the clear and convincing evidence standard best accommodated these disparate inter-

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146 *See id*. (citing United States v. Wade, 338 U.S. 218, 240 (1967)).

147 *See id.*

148 *See White*, 116 F.3d at 912.

149 *Id.*

150 *Id*.

151 *See* People v. Geraci, 649 N.E.2d 817, 821 (N.Y. 1995); State v. Mason, 162 P.3d 396, 404 (Wash. 2007).

152 *See Geraci*, 649 N.E.2d at 822.

153 *Id*. at 821.

ests.[154] This position, however, continues to remain the significantly minority position regarding the burden of proof.

F. Shall the Courts Use Hearing Aids? The Use of Pretrial Hearings

A majority of jurisdictions require courts to conduct pretrial hearings regarding forfeiture by wrongdoing.[155] However, all of these jurisdictions fail to include in their opinions why these hearings are necessary. These jurisdictions also do not cite to a state constitution or to constitutional cases when concluding that a hearing is required.[156] It may therefore be inferred that the hearings are not constitutionally required, but rather are the preferred vehicle for expeditious resolution of the issues courts confront with forfeiture by wrongdoing.

Two courts have not commented on the propriety of using pretrial hearings, but have tacitly approved of them.[157] The *Federal Rules of Evidence* expresses no opinion as to whether a hearing is required.[158]

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[154] *Id*. at 822. The Washington Supreme Court, in *Mason*, cited to *Geraci* to support its conclusion that clear and convincing evidence was the correct burden of proof to use. *Mason*, 162 P.3d at 404-05. The Washington Supreme Court, however, did not conduct any analysis independent of that contained in *Geraci*, which means that the clear and convincing evidence standard was adopted because of the same reasons.

[155] *See* CAL. EVID. CODE § 1350(c) ; MD. CODE. ANN., CTS. & JUD. PROC. §10-901(b) (2007); United States v. Dhinsa, 243 F.3d 635, 653-54 (2d Cir. 2001) (affirming the court's holding in *Mastrangelo* that a hearing is required); United States v. Balano, 618, F.2d 624, 629 (10th Cir. 1980), *overruled on other grounds by* United States v. Willis, 102 F.3d 1078 (10th Cir. 1996); State v. Valencia, 924 P.2d 497, 502 (Ariz. 1996); Vasquez v. People, 173 P.3d 1099, 1105 (Colo., 2007); State v. Henry, 820 A.2d 1076, 1087 (Conn. 2003) (agreeing with *Dhinsa*, 243 F.3d at 653-54); Commonwealth v. Edwards, 830 N.E.2d 158, 174 (Mass. 2005); State v. Sheppard, 484 A.2d 1330, 1346-47 (N.J. Sup. Ct. 1984) (ruling that a hearing is required based on the state rule of evidence); State v. Ivy, 188 S.W.3d 132, 147 (Tenn. 2006) (citing *Dhinsa*, 243 F.3d at 653-54).

[156] *Compare Edwards*, 830 N.E.2d at 174 (citing to United States v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982)) *with Dhinsa*, 243 F.3d at 653-54, *Balano*, 618, F.2d at 629, *Valencia*, 924 P.2d at 502, *Vasquez*, 173 P.3d at 1105; *Henry*, 820 A.2d at 1087, *Sheppard*, 484 A.2d at 1346-47, *and Ivy*, 188 S.W.3d at 147.

[157] *See Geraci*, 649 N.E.2d at 819; State v. Hand, 840 N.E.2d 151, 171-72, 173 (Ohio 2006).

[158] *See* FED R. EVID. 804(b)(6).

Four jurisdictions do not require hearings.[159] Two of these courts, looking again at the significant similarity between the handling of forfeiture by wrongdoing and admission of co-conspirator statements, concluded that there is no reason for a pretrial hearing.[160] The courts reasoned that because co-conspirator statements are admitted without a full pretrial hearing regarding the government's proof, there was then no reason to impose a pretrial hearing requirement for forfeiture by wrongdoing.[161] The District of Columbia Court of Appeals rejected the argument that a pretrial hearing was necessary, concluding that a hearing would be duplicative and a waste of judicial resources.[162]

The courts have also commented about what kind of evidence should be adduced at the hearing.[163] Courts have required independent evidence to corroborate the forfeiture finding; that is, a court cannot rely upon the statement of the unavailable witness.[164] No court appears to have considered the issue of whether the unavailable witness's hearsay statement alone could sustain a finding of forfeiture by wrongdoing.[165]

Another issue that has arisen regarding how forfeiture by wrongdoing is proven is the issue of bootstrapping. Defendants, however, object to the courts' consideration of statements of unavailable witnesses as substantive evidence. They argue that the government may not be able to prove forfeiture by wrongdoing, thus defeating the purpose of

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159 *See* United States v. Gray, 405 F.3d 227, 241 (4th Cir. 2005) (citing to United States v. Johnson, 219 F.3d 349, 356 (4th Cir. 2000)); United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999); United States v. White, 116 F.3d 903, 913, 915 (D.C. Cir. 1997); Crutchfield v. United States, 779 A.2d 307, 329-30 (D.C. 2001).

160 *See White*, 116 F.3d at 915; *Emery*, 186 F.3d at 926-27. *White* also presented a unique and interesting situation where conducting a full pretrial hearing on forfeiture by wrongdoing would have tremendously endangered some of the witnesses who were going to testify at trial. *White*, 116 F.3d at 903, 913-16.

161 *See White* 116 F.3d at 915; *Emery*, 186 F.3d at 926-27.

162 *See Crutchfield*, 779 A.2d at 331 (citing *Emery*, 186 F.3d at 926).

163 *See*, *e.g.*, People v. Giles, 152 P.3d 433, 446 (Cal. 2007), *cert. granted*, Giles v. California, 128 S. Ct. 976 (2008) (mem.); *Geraci*, 649 N.E.2d at 823.

164 *Giles*, 152 P.3d at 446; *see also Geraci*, 649 N.E.2d at 823 (noting that an unavailable witness's prior Grand Jury testimony is generally inadmissible as evidence of wrongdoing).

165 *See, e.g., White*, 116 F.3d at 914 ("We leave for another day the issue of whether a forfeiture finding could rest *solely* on hearsay").

the hearing.[166] All of the federal and state courts to consider the issue have permitted the statement to be considered as substantive evidence, thus, rejecting the defendants' bootstrapping claims.[167]

G. How Wrong Must the Wrongdoing Be?

The degree of wrongdoing is another area of forfeiture by wrongdoing where a lot of disagreement exists among jurisdictions.[168] The disagreement has generally not been about which affirmative actions constitute wrongdoing. Rather, they have generally centered on whether the wrongdoing must be perpetrated by the person who is actually on trial, or whether the wrongdoer can forfeit his confrontation and hearsay objections by acquiescing to wrongful actions.[169]

Beginning with the conceptions of wrongdoing that are most widely accepted, all jurisdictions agree that the defendant does not need to perform a criminal act.[170] This conclusion is, *inter alia*, consistent with *Reynolds*. The defendant's non-criminal action in *Reynolds*, that is,

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166 *See, e.g., id*.

167 United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982) (relying on FED. R. EVID. 104(a)); *White*, 116 F.3d at 914 (collecting federal cases); *Vasquez*, 173 P.3d at 1106; People v. Stechly, 870 N.E.2d 333, 353 (Ill. 2007) (relying upon the *Davis* Court's implicit approval); *Edwards*, 830 N.E.2d at 174. The federal courts have been able to rely upon FED. R. EVID. 104(a), which provides that when courts are determining preliminary questions regarding evidence they are not bound by the other rules of evidence except for privilege rules. There has generally been heavy reliance on *Bourjaily*. *See, e.g., White,* 116 F.3d at 914.

168 *Compare* DEL. R. EVID. 804(b)(6), KY. R. EVID. 804(b)(5), N.D. R. EVID. 804(b)(6), PA. R. EVID. 804(b)(6), *and* VT. R. EVID. 804(b)(6), *with* MD. CODE ANN. CTS. & JUD. PROC. § 10-901(b)(2) (2007), MICH. R. EVID. 804(b)(6), OHIO R. EVID. 804(b)(6), OR. REV. STAT. ANN. § 40.465(2), (3)(a) (2007), *and* TENN. R. EVID. 804(b)(6).

169 *Compare* DEL. R. EVID. 804(b)(6), KY. R. EVID. 804(b)(5), MD. CODE ANN. CTS. & JUD. PROC. § 10-901(b)(2) (2007), MICH. R. EVID. 804(b)(6), N.D. R. EVID. 804(b)(6), OHIO R. EVID. 804(b)(6), OR. REV. STAT. ANN. § 40.465(2), (3)(a) (2007), PA. R. EVID. 804(b)(6), TENN. R. EVID. 804(b)(6), *and* VT. R. EVID. 804(b)(6), *with* United States v. Carson, 455 F.3d 336, 363-64 (D.C. Cir 2006), United States v. Thompson, 286 F.3d 950, 963-64 (7th Cir. 2002), United States v. Cherry, 217 F.3d 811, 820 (10th Cir. 2000), *and* Gatlin v. United States, 925 A.2d 594, 599-00 (D.C. 2007).

170 *See* FED. R. EVID. 804(b)(6), advisory committee's note; *see also Reynolds*, 98 U.S. at 167 (no evidence of criminal activity); *Edwards*, 830 N.E.2d at 169.

his refusing to reveal where his wife was located, forfeited his right to confront the witness against him.[171] Furthermore, conducting a criminal act, such as witness tampering, can also result in forfeiture.[172] Other examples of non-criminal conduct that may trigger forfeiture include: threatening or intimidating witnesses, colluding with witnesses to ensure their unavailability,[173] "persuasion and control by a defendant, the wrongful nondisclosure of information, and a defendant's direction to a witness to [baselessly] exercise the fifth amendment privilege."[174] All jurisdictions have a causation element; there is a requirement that the government prove that the defendant's actions caused, at least in part, the witness's unavailability.[175]

Moving now to the disagreements among jurisdictions, an example of a very inclusive rule is section 804(b)(6) of the *Federal Rules of Evidence*. The federal rule states that a defendant forfeits his or her right when he or she "engage[s] or acquiesce[s] in wrongdoing."[176] The committee note indicates that the rule was made this broad so that it could act as a deterrent to actions that "strike[ ] at the heart of the system of justice itself."[177] Acquiescence has been defined as "the act or condition of acquiescing or giving tacit assent; agreement or consent by

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171 *See Reynolds*, 98 U.S. at 159-60.

172 *See*, *e.g.*, *Edwards*, 830 N.E.2d at 169 (noting that the doctrine also "should apply in cases where a defendant murders . . . a witness"). However, murder presents unique problems that will be addressed later in this section.

173 *See id*. at 168-70.

174 State v. Hallum, 606 N.W.2d 351, 356 (Iowa 2000) (internal quote omitted); s*ee also* United States v. Scott, 284 F.3d 758, 764 (7th Cir. 2002) ("[I]t contemplates application against the use of coercion, undue influence, or pressure to silence testimony and impede the truth-finding function of trials. We think that applying pressure on a potential witness . . . by threats of harm and suggestions of future retribution, is wrongdoing."); United States v. Scott, 284 F.3d 758, 763-64 (7th Cir. 2002) (discussing the definition of "wrongdoing.").

175 *See, e.g., Edwards*, 830 N.E.2d at 169; State v. Henderson, 129 P.3d 646, 655 (Kan. Ct. App. 2006).

176 *Id.*

177 FED. R. EVID. 804(b)(6) advisory committee's note (citing United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982)) (internal quotes omitted).

silence or without objection."[178] This specific formulation, using the word *acquiesce*, has been adopted by five additional jurisdictions.[179]

A number of other jurisdictions have adopted a form of forfeiture by wrongdoing that is otherwise the same, but does not include acquiescence.[180] Only Ohio offered explicit analysis as to why acquiescence was not included. According to the 2001 staff notes, the drafters considered the federal rule's coverage to be too broad and the drafters wanted to ensure that a person's mere inaction would not work as forfeiture.[181]

There has been particularly unique analysis in situations where the government has claimed that a co-conspirator forfeited his or her confrontation or hearsay objections. Thus far, three federal courts and one state court have dealt with this issue; only the decisions from the United States courts of appeals have been reported.[182] The first case to directly address this issue was *United States v. Cherry*, where the court concluded that a defendant waived his or her right to confrontation and hearsay objections when "he or she participated directly in planning or procuring the declarant's unavailability through wrongdoing . . . or [ ]

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178 United States v. Rivera, 412 F.3d 562, 567 (4th Cir. 2005) (citing WEBSTER'S UNABRIDGED DICTIONARY 18 (Random House, 2d ed. 2001)) (internal quotes omitted).

179 *See* DEL. R. EVID. 804(b)(6); KY. R. EVID. 804(b)(5); N.D. R. EVID. 804(b)(6); PA. R. EVID. 804(b)(6); VT. R. EVID. 804(b)(6). Each of these jurisdictions indicate in their committee notes that the rules were adopted with the intention to track the federal rule of evidence. *See* DEL. R. EVID. 804(b)(6) cmt. notes; KY. R. EVID. 804(a)(5) cmt. notes; N.D. R. EVID. 804(b)(6) cmt. notes; PA. R. EVID. 804(b)(6) cmt. notes; VT. R. EVID. 804(b)(6) reporter's notes.

180 *See* MD. CODE ANN. CTS. & JUD. PROC. § 10-901(b)(2) (2007); MICH. R. EVID. 804(b)(6); OHIO R. EVID. 804(b)(6); OR. REV. STAT. ANN. § 40.465(3)(g) (2007); TENN. R. EVID. 804(b)(6).

181 The staff notes cited to *Mastrangelo* as an example of too broad an application of forfeiture by wrongdoing. *See* OHIO R. EVID. 804(b)(6) staff notes 2001. The Ohio drafters do not state why *Mastrangelo* would offend Ohioan principles, but it seems likely that the drafters of the Ohio rule considered that confrontation and hearsay objections should not be as easily waived.

182 *See* United States v. Carson, 455 F.3d 336, 363-64 (D.C. Cir 2006); United States v. Thompson, 286 F.3d 950, 963-66 (7th Cir. 2002); United States v. Cherry, 217 F.3d 811, 815-22 (10th Cir. 2000); Gatlin v. United States, 925 A.2d 594, 599-601 (D.C. 2007).

the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy."[183] The *Cherry* court rested its formulation of this rule on two premises. First, the court concluded that the word acquiesce in Rule 804(b)(6) implied that a co-conspirator, who took no affirmative actions, could still forfeit his or her confrontation and hearsay objections.[184] Second, the court concluded that the principles embodied in the *Pinkerton* theory of conspiratorial liability were the most analogous and instructive for the situation.[185] *Pinkerton* was the appropriate choice because it allowed the court to sufficiently balance the need to deter witness tampering with the need to forfeit the confrontation and hearsay rights of only those who could have been likely to understand that their rights were going to be forfeited.[186] Specifically, the court held that merely planning could, in some situations, be sufficient to work a forfeiture.[187]

Two years later, in *Thompson*, the United States Court of Appeals for the Seventh Circuit adopted the *Cherry* court's analysis and rule.[188] The court recognized that because the rule in *Cherry* sufficiently limited "waiver-by-misconduct to those acts that were reasonably foreseeable to each individual defendant, the rule captures only those conspirators that actually acquiesced either explicitly or implicitly to the misconduct."[189] The Seventh Circuit further rejected the *Cherry* dissent's criticism of the majority-made rule where mere membership in a conspiracy counts as forfeiture.[190] The court reasoned that requiring

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183 Cherry, 217 F.3d at 820.

184 *Id*. at 816.

185 *Id*. at 816-20.

186 *See id*. at 818-20. The court looked to *Mastrangelo*, *Houlihan*, and the district court opinion in *White* for instruction. *Mastrangelo* did establish a "broad definition of imputed waiver" but ultimately did not decide the issue of whether there was a waiver because the record was insufficient. *Id.* at 818-19. The court found that although *Houlihan* involved a conspiracy, it did not specifically address the issue of co-conspiratorial forfeiture. *See id.* at 819. The court rejected the *White* approach because the analysis was incomplete, since the *White* court did not factor in a *Pinkerton* theory of conspiracy. *Id.* at 820.

187 *Id*. at 821-22. The court remanded this case to the district court for findings on this issue. *Id.* at 821.

188 United States v. Thompson, 286 F.3d 950, 963-66 (7th Cir. 2002).

189 *Id*. at 965.

190 *See id*. at 964.

foreseeability, and that the action had been made in furtherance of the conspiracy, created sufficient limitations such that the dissent's worry was misplaced.[191] The United States Court of Appeals for the District of Columbia Circuit also adopted the *Cherry* rule as well as the use of *Pinkerton* as a framework for deciding the forfeiture issue.[192]

Notably, all of the courts to explicitly consider the issue of co-conspiratorial forfeiture by wrongdoing have decided that a co-conspirator can indeed forfeit another co-conspirator's confrontation and hearsay rights.[193] However, this observation may be limited in its utility. Each of the courts, save the District of Columbia Court of Appeals, at the time of their decisions had a codified form of forfeiture by wrongdoing in place that included the word *acquiesced*.[194] Further, the reasoning of these courts may be less helpful to other jurisdictions that have different theories of conspiratorial liability.

Regarding the forfeiture of confrontation and hearsay objections through acquiescence, there does not appear to be much of a clearly reasoned majority position. All that can be gleaned at the moment is that the Confrontation Clause permits the forfeiture of confrontation rights through acquiescence in some instances.[195] Although a larger number of jurisdictions will find that a defendant forfeits his or her confrontation and hearsay objections when he or she acquiesces in wrongdoing, many jurisdictions have not yet squarely confronted this issue.[196] Without more jurisdictions addressing the specific issue of

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191 *See id*. The court ultimately concluded that the murder that was the subject of the prosecution in this case was not reasonably foreseeable for the co-conspirators and thus concluded that their Confrontation and hearsay rights were not forfeited. *Id*. at 965-66.

192 *See* United States v. Carson, 455 F.3d 336, 363-64 (D.C. Cir. 2006). The court further noted several other cases that indirectly recognized that the idea of imputed forfeiture was legal. *See id*. at 364 n.24.

193 *See, e.g., id.* at 363-64; *Thompson*, 286 F.3d at 964-65; United States v. Cherry, 217 F.3d 811, 816 (10th Cir. 2000).

194 *See* FED. R. EVID. 804(b)(6); *Carson*, 455 F.3d at 363 (applying FED. R. EVID. 804(b)(6)); *Thompson*, 286 F.3d at 962 (applying FED. R. EVID. 804(b)(6)); *Cherry*, 217 F.3d at 815-16 (applying FED. R. EVID. 804(b)(6)).

195 *See, e.g., Cherry,* 217 F.3d at 816.

196 *See* State v. Valencia, 924 P.2d 497, 498 (Ariz. Ct. App. 1996).

whether a defendant may acquiesce and still forfeit his or her confrontation and hearsay objections, a conclusion cannot be reached about whether there is a definitive majority rule.

H. Reliability Review

Several jurisdictions addressing forfeiture by wrongdoing have identified the issue of whether there must be a separate reliability determination regarding the hearsay admitted through operation of the rule. However, few have decided this issue and the United States Supreme Court has offered only cryptic guidance. Justice Scalia wrote in *Crawford* that forfeiture by wrongdoing "does not purport to be an alternative means of determining reliability."[197] Among the courts that have identified the issue, six courts have identified the possibility that a court may need to conduct an additional reliability analysis when deciding whether to admit hearsay, despite having already found that both confrontation and hearsay objections have been extinguished through forfeiture by wrongdoing.[198]

In general, there are two theories supporting the need for a reliability analysis of the hearsay that is to be admitted pursuant to forfeiture by wrongdoing. One basis is Rule 403 of the *Federal Rules of Evidence*, which prohibits evidence whose "probative value is substantially

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[197] Crawford v. Washington, 541 U.S. 36, 62 (2004).

[198] *See* United States v. Zlatogur, 271 F.3d 1025, 1029 n.2 (11th Cir. 2001) (questioning whether reliability analysis was required under FED. R. EVID. 804 (b)(6)); Devonshire v. United States, 691 A.2d 165, 169 n.6 (D.C. 1997) ("[T]he [*Aguiar*] court recognized that the admission of facially unreliable hearsay would raise a due process issue and stated that an objection that probative value is outweighed by prejudicial effect is not waived by procuring a witness's absence." (citing United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992))); United States v. Carlson, 547 F.2d 1346, 1354 (8th Cir. 1977) (questioning whether the court needed to conduct an independent reliability analysis); State v. Gettings, 769 P.2d 25, 29-30 (Kan. 1989) (finding that admitted hearsay was reliable without addressing the need for a reliability determination); People v. Cotto, 642 N.Y.S.2d 790, 793 n.4 (N.Y. Sup. Ct. 1996) (recognizing that *Geraci* did not reach the issue of minimal reliability for hearsay admitted through forfeiture by wrongdoing). *See generally* State v. Hallum, 606 N.W.2d 351, 358 n.6 (Iowa 2000) (opining that due process might require a reliability analysis).

outweighed by the danger of unfair prejudice."[199] Each of the courts using this justification determined that an additional due process-based finding on reliability would be superfluous,[200] because the right to confrontation no longer existed. Yet, each court found that the trial court should conduct a Rule 403 balancing inquiry regarding the evidence so as "to avoid the admission of facially unreliable hearsay."[201]

The second theory involves due process claims. Ohio is the only jurisdiction to base the requirement of an independent reliability determination on a perceived due process requirement.[202] The drafters of the Ohio rule, however, did not elaborate in the staff notes as to why due process may require this additional analysis.[203] The staff notes indicate that alternatively, the trial court retains authority under rule 403 of the *Ohio Rules of Evidence* to determine the evidence was not admissible and thus avoid the constitutional question altogether.[204]

California, per statute, explicitly requires a finding that the "statement was made under circumstances which indicate its trustworthiness . . .," which is a surrogate for a reliability test.[205] Colorado

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[199] FED. R. EVID. 403. This position has been adopted by two federal courts. *See* United States v. Dhinsa, 243 F.3d 635, 655-56 (2d. Cir. 2001); United States v. Houlihan, 92 F.3d 1271, 1282 n.6 (1st Cir. 1996).

[200] *See* United States v. Dhinsa, 243 F.3d 635, 655 (2d Cir. 2001) (citing United States v. Houlihan, 92 F.3d 1271,1281 (1st Cir. 1996); United States v. Houlihan, 92 F.3d 1271, 1281 (1st Cir. 1996).

[201] *Dhinsa*, 243 F.3d at 654*;* accord United States v. White, 116 F.3d 903, 913 (D.C. Cir. 1997) ("[D]efendants were free to move for exclusion under Rule 403 based upon the lack of reliability . . . ."); *see Houlihan*, 92 F.3d at 1282 n.6.

[202] OHIO EVID. R. 804(b)(6) staff notes 2001.

[203] *See id.*

[204] *Id.* But it could also be argued that Minnesota requires an independent analysis of the reliability of statements. *See* State v. Keeton, 573 N.W.2d 378, 382 (Minn. Ct. App. 1997). The court, in this opinion, said that "Due process if upheld when corroborative evidence indicates that the out-of-court statement[s] [were] not 'totally lacking' in reliability" and that securing a witness's absence did not forfeit objections under Minnesota's version of Federal Rule of Evidence 403. *Id*.; *accord* MINN. R. EVID. 403. *Keeton* was not included, however, because it was reversed, albeit on other grounds, in State v. Keeton, 589 N.W. 2d 85 (Minn. 1998).

[205] CAL. EVID. CODE § 1350 (a)(4). *See generally* People v. Giles, 152 P.3d 433 (Cal. 2007) (being the most recent California Supreme Court pronouncement on forfeiture by wrongdoing and not commenting on the need for a reliability test), *cert. granted*, Giles v. California, 128 S. Ct. 976 (2008) (mem.).

requires that in order for hearsay to be admitted through forfeiture by wrongdoing, that hearsay must fit within an established hearsay exception (inclusive of the residual exception) and therefore has a surrogate for reliability review.[206] This decision is based on Colorado taking the minority view that forfeiture by wrongdoing only extinguishes confrontation rights.[207]

I. Who Will Be A Witness?

It is helpful to survey the answers various courts have given regarding who qualifies as a *witness* for purposes of applying forfeiture by wrongdoing. Beginning with the most obvious, listed witnesses involved in pending litigation against a party qualify.[208] Defendants have argued that people cooperating with the government in building a case, but are not yet formal witnesses, are not witnesses for the purpose of forfeiture by wrongdoing.[209] This proposition has been rejected on the basis that adopting this logic would incentivize witness tampering at the pre-trial stage.[210] Victims of crime, particularly homicide victims, are witnesses for purposes of forfeiture by wrongdoing.[211]

J. Summary of the Contemporary Status of Forfeiture by Wrongdoing

Beginning with the areas of most uniformity, no court to address forfeiture by wrongdoing has challenged its legality in principle. In fact, a majority of states, as well as the federal courts, have made forfei-

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206 *See* Vasquez v. People, 173 P.3d 1099, 1105-07 (Colo. 2007).

207 *See generally id.*

208 *See, e.g.,* U.S. v. Mastrangelo, 693 F.2d 269, 271-72 (2d Cir. 1982).

209 *See, e.g.,* U.S. v. Houlihan, 92 F.3d 1271, 1279-80 (1st Cir. 1996).

210 *See*, *e.g.*, *id.* (labeling a murdered drug distributor who was working for defendants and who had inculpated defendants in drug distribution as a "witness"); Devonshire v. United States, 691 A.2d 165 (D.C. 1997) (defining a murdered eyewitness to defendant's other crime as a "witness" for application of forfeiture by wrongdoing in trial addressing that murder); State v. Ivy, 188 S.W.3d 132, 147, 149 n.6 (Tenn. 2006) (rejecting the proposition that for forfeiture by wrongdoing to apply formal charges needed to be pending).

211 *See*, *e.g.*, United States v. Garcia-Meza, 403 F.3d 364, 370 (6th Cir. 2005); State v. Meeks, 88 P.3d 789, 793-94 (Kan. 2004).

ture by wrongdoing a part of their law.[212] All jurisdictions require the witness whose testimony the aggrieved party seeks to admit be unavailable.[213] In addition, the wrongdoer must have caused the unavailability.[214] Most jurisdictions have used the word *forfeiture* instead of *waiver* to describe the legal operation by which the wrongdoer loses his or her confrontation and hearsay objections, concluding that a waiver framework would inappropriately require a knowing and intentional relinquishment of those rights.[215] Without much analysis, most courts have also used *wrongdoing* instead of *misconduct*.[216]

The most contention among jurisdictions surrounds the need for specific intent as part of the forfeiture by wrongdoing rule.[217] Currently, a majority of jurisdictions require that a defendant must have intended to silence the witness when he or she commits the wrong that causes the witness to be unavailable.[218] The need for an intent to silence requirement has been justified as being essential to the *notice* part

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[212] *See, e.g.*, Vasquez v. People, 173 P.3d 1099, 1106 (Colo. 2007).

[213] *See, e.g.,* FED. R. EVID. 804(b)(6).

[214] *See, e.g., id.*; DEL. R. EVID. 804(b)(6); KY. R. EVID. 804(b)(5); N.D. R. EVID. 804(b)(6); PA. R. EVID. 804(b)(6); VT. R. EVID. 804(b)(6).

[215] *See, e.g.,* State v. Hallum, 606 N.W.2d 351, 354-55 (Iowa 2000).

[216] *See, e.g.,* United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996).

[217] *See, e.g.,* People v. Giles, 152 P.2d 433, 441-42 (Cal. 2007) (recognizing the wide disagreement among jurisdictions), *cert. granted*, Giles v. California, 128 S. Ct. 976 (2008) (mem.); Gonzalez v. State, 195 S.W.3d 114, 120-21 (Tex. Crim. App. 2006) (noting the disagreement among courts regarding the specific intent requirement).

[218] *See, e.g.*, CAL. EVID. CODE § 1350(a)(1) (requiring specific intent to forfeit hearsay objection); MD. CODE ANN., CTS. & JUD. PROC. § 10-901(a) (2007) (requiring specific intent to forfeit hearsay objection); MICH. R. EVID. 804(b)(6) (requiring specific intent to forfeit hearsay objection); Vasquez v. People, 173 P.2d 1099, 1104 (Colo. 2007) (requiring specific intent to forfeit Confrontation Clause objection); People v. Stechly, 870 N.E.2d 333, 349-53 (Ill. 2007) (requiring specific intent to forfeit Confrontation Clause objection); Commonwealth v. Edwards, 830 N.E.2d 158, 170 (Mass. 2005) (requiring specific intent to forfeit confrontation and hearsay objections); State v. Romero, 156 P.3d 694, 703 (N.M. 2007) (requiring specific intent to forfeit confrontation objection); People v. Geraci, 649 N.E.2d 817, 821-22 (N.Y. 1995) (requiring specific intent to forfeit confrontation and hearsay objections); State v. Hand, 840 N.E.2d 151, 170-72 (Ohio 2006) (requiring specific intent to forfeit confrontation and hearsay objections); Commonwealth v. Laich, 777 A.2d 1057, 1062 n.4 (Penn. 2001) (requiring specific intent to forfeit hearsay objections); State v. Ivy, 188 S.W.3d 132, 147-48 (Tenn. 2006) (requiring specific intent to forfeit confrontation and hearsay objection).

of the waiver rationale for forfeiture by wrongdoing.[219] It is also needed to ensure that forfeiture by wrongdoing is applied only when a defendant acts with the intent to disrupt the justice system.[220] The courts not requiring an intent to silence have reasoned that not being able to confront a witness is a foreseeable consequence of making that witness unavailable, and that a defendant should not be able to benefit at all from his wrongdoing regardless of intent.[221] The courts are divided regarding the effect that *Reynolds*, *Crawford*, and *Davis* have on this issue.

There are nonetheless other areas where a majority position exists. Of the courts that have confronted the issue of whether forfeiture by wrongdoing based on the common law alone forfeits both confrontation as well as hearsay objections, all but one have reasoned that both objections are forfeited, but under divergent rationales.[222] Only three jurisdictions have required the government to prove the elements of forfeiture by wrongdoing by clear and convincing evidence;[223] the rest have required the government to meet only the preponderance of the evidence standard.[224] There also has been much agreement regarding

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219 *See, e.g., Houlihan,* 92 F.3d at 1279-80.

220 *See, e.g.,* State v. Alvarez-Lopez, 98 P.3d 699, 705 (N.M. 2004).

221 *See* State v. Mason, 162 P.3d 396, 404 (Wash. 2007).

222 *See* United States v. White, 116 F.3d 903, 912 (D.C. Cir. 1997); United States v. Houlihan, 92 F.3d 1271, 1281-82 (1st Cir. 1996); United States v. Mastrangelo, 693 F.2d 269, 272 (2d Cir. 1982); United States v. Thevis, 665 F.2d 616, 632-33 (5th Cir. 1982), *superseded by statute on other grounds*, FED. R. EVID. 804(b)(6); United States v. Balano, 618 F.2d 624, 626 (10th Cir. 1979), *overruled on other grounds by* United States v. Willis, 102 F.3d 1078 (10th Cir. 1996); State v. Valencia, 924 P.2d 497, 502 (Ariz. 1996); Devonshire v. United States, 691 A.2d 165, 165-69 (D.C. 1997); State v. Hallum, 606 N.W.2d 351, 356 (Iowa 2000); Commonwealth v. Edwards, 830 N.E.2d 158, 170 (Mass. 2005); Geraci, 649 N.E.2d at 821.

223 *See* Md. Code Ann., Cts. & Jud. Proc. § 10-901 (2007); People v. Geraci, 649 N.E.2d 817, 821 (N.Y. 1995); State v. Mason, 162 P.3d 396, 404-05 (Wash. 2007).

224 *See* FED. R. EVID. 804(b)(6) advisory committee's note to 1997 amendments; State v. Valencia, 924 P.2d 497, 502 (Ariz. 1996); Vasquez v. People, 173 P.3d 1099, 1105 (Colo. 2007); Devonshire v. United States, 691 A.2d 165, 169 (D.C. 1997); People v. Stechly, 870 N.E.2d 333, 353 (Ill. 2007); State v. Hallum, 606 N.W.2d 351, 355-56 (Iowa 2000); State v. Gettings, 769 P.2d 25, 29 (Kan. 1989); Commonwealth v. Edwards, 830 N.E.2d 158, 172-73 (Mass. 2005); People v. Jones, 714 N.W.2d 362, 368-69 (Mich. Ct. App. 2006); State v. Sheppard, 484 A.2d 1330, 1348 (N.J. Super. Ct. Law Div. 1984); State v. Hand, 840 N.E.2d 151, 172 (Ohio 2006); State v. Ivy,

who qualifies as a witness for purposes of forfeiture by wrongdoing. Listed witnesses, victims of crimes, and cooperating co-conspirators are all witnesses for purposes of forfeiture by wrongdoing.[225]

The conduct of hearings regarding forfeiture by wrongdoing has provided fertile ground for analysis. Although most jurisdictions, without much analysis, have simply adopted the requirement that the trial court must conduct a pretrial hearing,[226] other jurisdictions have given close analysis to the conduct of these hearings.[227] All of these courts, both federal and state, determined that the unavailable witness's statement can be considered as substantive evidence.[228] Courts have often looked to the treatment of hearsay under the co-conspirator exception for guidance.[229] Several courts have raised the issue of whether a court must, during the hearing, analyze whether the hearsay is reliable—but there is no clear majority position on this.[230]

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188 S.W.3d 132, 147 (Tenn. 2006); State v. Jensen, 727 N.W.2d 518, 535-36 (Wis. 2007) (recognizing that preponderance of the evidence is the majority position).

225 *See*, *e.g.*, United States v. Garcia-Meza, 403 F.3d 364, 370-71 (6th Cir. 2005); United States v. Houlihan, 92 F.3d at 1279-80; Devonshire v. United States, 691 A.2d 165, 166 (D.C. 1997); State v. Meeks, 88 P.3d 789, 793-94 (Kan. 2004); State v. Ivy, 188 S.W.2d 132, 147, 149 n.6 (2006).

226 *See, e.g., Geraci*, 649 N.E.2d at 819; *see also Hand*, 840 N.E.2d at 171-72, 173.

227 *See, e.g., Edwards*, 830 N.E.2d at 174.

228 *See White*, 116 F.3d at 914 (collecting federal cases); United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982) (relying on FED. R. EVID. 104(a)); *Vasquez*, 173 P.3d at 1106; People v. Stechly, 870 N.E.2d 333, 353 (Ill. 2007) (relying upon the *Davis* Court's implicit approval); *Edwards*, 830 N.E.2d at 174.

229 *See* United States v. Carson, 455 F.3d 336, 363-64 (D.C. Cir. 2006); United States v. Thompson, 286 F.3d 950, 963-66 (7th Cir. 2002); United States v. Cherry, 217 F.3d 811, 815-22 (10th Cir. 2000); Gatlin v. United States, 925 A.2d 594, 599-601 (D.C. 2007).

230 *See* United States v. Zlatogur, 271 F.3d 1025, 1029 n.2 (11th Cir. 2001) (questioning whether reliability analysis was required under FED. R. EVID. 804 (b)(6)); Devonshire v. United States, 691 A.2d 165, 169 n.6 (D.C. 1997) ("[T]he [*Aguiar*] court recognized that the admission of facially unreliable hearsay would raise a due process issue and stated that an objection that probative value is outweighed by prejudicial effect is not waived by procuring a witness's absence." (citing United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992))); United States v. Carlson, 547 F.2d 1346, 1354 (8th Cir. 1977) (questioning whether the court needed to conduct an independent reliability analysis); State v. Gettings, 769 P.2d 25, 29-30 (Kan. 1989) (finding that admitted hearsay was reliable without addressing the need for a reliability determination); People v. Cotto, 642 N.Y.S.2d 790, 793 n.4 (N.Y. Sup. Ct. 1996)

V. Forfeiture in Florida—The Argument for Its Recognition and Adoption

Currently, there are no judicial decisions in Florida in which forfeiture by wrongdoing was adopted, or even analyzed at all.[231] Within this section, several observations and arguments will be made. First, the case will be made for the need, more than ever, for the recognition and adoption of forfeiture by wrongdoing. Second, the argument will be made that forfeiture by wrongdoing, in a minimal form, is already a part of the common law in Florida. The bases for this conclusion are section 90.102 of the *Florida Statutes*[232] as well as the fact that *Reynolds* is common law authority construing the Sixth Amendment, which applies to Florida through the Fourteenth Amendment.[233] Third, an argument will be advanced for the adoption of a particular form of forfeiture by wrongdoing into the *Florida Evidence Code*. This particular form of forfeiture by wrongdoing will make forfeiture by wrongdoing flexible enough to cope with the current challenges the justice system is facing, while incorporating the justifiable criticisms of other formulations of forfeiture by wrongdoing.

(recognizing that *Geraci* did not reach the issue of minimal reliability for hearsay admitted through forfeiture by wrongdoing). *See generally* State v. Hallum, 606 N.W.2d 351, 358 n.6 (Iowa 2000) (opining that due process might require a reliability analysis).

231 The minor exception to this is Williams v. State, 947 So.2d 517, 520-21 (Fla. Dist. Ct. App. 2006). In this case, the court addresses the issue of whether a victim's statements could be admitted over a Confrontation Clause objection. *Id.* at 518-19. The court, while mulling over which basis it needed to use to decide the issue, noted that several courts have found dying declarations survive *Crawford* and the forfeiture by wrongdoing was mentioned in *Crawford*. *Id.* at 520. The opinion states that though there is no comparable provision in the Florida Evidence Code, but that Florida does recognize that a party's wrongdoing may affect a waiver. *Id.* The court then cites to Ellison v. State, 349 So. 2d 731, 732 (Fla. Dist. Ct. App. 1977). *Williams,* 947 So. 2d at 520. *Ellison*, however, addresses the "invited error" doctrine that applies to trial practice and cross-examination. *See Ellison*, 349 So.2d at 732. *Ellison* had nothing to do with the Sixth Amendment or forfeiture by wrongdoing. *See Ellison*, 349 So. 2d at 731-32.

232 Fla. Stat. § 90.102 (2007).

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

A. The Need for Forfeiture by Wrongdoing

The arguments for recognizing and adopting forfeiture by wrongdoing can be separated into two general groups:[234] the first is based on statistical and anecdotal evidence and the second is based on sound public policy concerns. It is true that there are no reports dedicated solely to statistical compilation of the number of witness tampering incidents that happen each year; however, looking at related statistics can help to determine how widespread witness tampering likely is. Specifically, the increases in gang violence, domestic violence, and acceptance and practice of witness tampering in Florida, are the most easily discerned and persuasive arguments revealing its prevalence.[235]

Although reluctant to recognize it, Florida has finally admitted that it has a gang problem.[236] Florida's increase in gang membership was larger than any other state in the past twenty five years, which led Florida to form a task force to address its widespread gang issue.[237] Gangs are a form of organized crime, but differ from traditional models of organized crime because of the openness with which they operate, as well as the often unprincipled brutality they use.[238] Police in Florida recognize that an increased gang presence results in an increase in

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234 *See* discussion *supra* Part I for an explanation for why the author uses "recognition" and "adoption."

235 *See* Andrew King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441, 458-60 (2006); *see also* FLORIDA DEPARTMENT OF LAW ENFORCEMENT, CRIME IN FLORIDA: JANUARY – JUNE 2007 (2007), *available at* http://www.fdle.state.fl.us/FSAC/UCR/2007/2007SA_CIF.pdf (last visited Jan. 2, 2008); Supreme Court of Fla., 2d Interim Report of the Tenth Statewide Grand Jury (1992) *available at* http://myfloridalegal.com/pages.nsf/4492d797dc0bd92f85256cb80055fb97/33f5f7168542f9f185256cca006be9c3!OpenDocument (last visited Jan. 2, 2008).

236 *See* FLA. STATEWIDE GRAND JURY, *supra* note 235.

237 *See* Press Release, Office of the Attorney General of Florida, Attorney Gen. Announces Collaborative Efforts to Develop a Statewide Anti-Gang Strategy (Oct. 25, 2007) (on file with author), *available at* http://myfloridalegal.com/__852562220065EE67.nsf/0/26979442134F64718525737F00630235?Open&Highlight=0,gang (last visited Jan. 2, 2008).

238 GEORGE KNOX, AN INTRODUCTION TO GANGS 7-8 (Wyndam Hall Press 1994) (1991).

homicides and violent retaliatory crimes.[239] For example, Katherine Fernandez Rundle, the Miami-Dade County State Attorney, observed that Haitian gangs had an increased presence in Miami in 2006 and that those gang members often acted in a retaliatory manner.[240] More to the point, a greater gang presence brings with it an increased potential for witness intimidation and tampering.[241] A specific example of this is the recent attempted murder of a robbery victim in Fort Lauderdale. In July 2007, a man named Edder Joseph was robbed in Pompano Beach, Florida.[242] Joseph contacted the police, and a few days later he was confronted by two men, Watson Prophilis and Jean Wesley.[243] These two men attempted to convince Joseph to not cooperate with the police, and when Joseph proved to be recalcitrant, Wesley shot at Joseph with a handgun.[244] Both defendants, Wesley and Prophilis, were associated with a gang known as "Doom City."[245] This kind of tampering, if not stymied, could significantly impair Florida's ability to vindicate the wrongs committed upon its citizens.[246]

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239 *See* Jerome Burdi, *In Palm Beach County, Homicides Climb to Record High*, SUN SENTINEL (Fla.), Jan. 6, 2008, available at 2008 WL 310430 (reporting police as citing gangs as the reason for the increase in homicides in Palm Beach County in 2007).

240 *See State Attorney: Problems Posed by Haitian Gangs Growing* (WTVJ television broadcast June 7, 2006) (on file with author), *available at* http://www.nbc6.net/news/9337747/detail.html (last visited Jan. 10, 2008). This broadcast also notes that the intimidation conducted by Haitian gangs results in a hampering of law enforcement's efforts to control the gangs. *Cf. Miami-Dade County Murder Rate is Up; Increased Murder Rate Attributed to Gang Warfare* (WFOR television broadcast, Sept. 12, 2006) (on file with author), *available at* http://cbs4.com/local/Miami.News.Murder.2.399131.html (last visited Jan. 10, 2008) (reporting that witnesses in the gang-ridden areas of Miami-Dade are hesitant to cooperate because of fear of gang retaliation).

241 *See Highlights of the 2000 National Youth Gang Survey, OJJDP Fact Sheet* (U.S. DEP'T OF JUST., OFF. OF JUV. JUST. AND DELINQ. PROGS., D.C.), Feb. 2002, at 2, *available at* http://www.nagia.org/PDFs/fs200204.pdf (on file with author) (last visited Jan. 7, 2008).

242 *Police Arrest Two on Witness Tampering Charges in Pompano Beach*, SUN-SENTINEL (Fla.), July 22, 2007, *available at* http://www.topix.net/city/pompano-beach-fl/2007/07/police-arrest-two-on-witness-tampering-charges-in-pompano-beach (on file with author) (last visited Jan. 10, 2008).

243 *Id*.

244 *See id*.

245 *Id.*

246 Also noteworthy is that it appears that gangs are now using the internet, as well as broad public access to courts, in order to identify witnesses in proceedings involving gang members and then intimidating those witnesses. *See* NATIONAL ALLIANCE OF

Domestic violence also plagues Florida.[247] In 2007 there were 56,914 arrests for domestic violence crimes, over 52,000 of them being for assault and aggravated assault.[248] Notably, 1,643 were for threat/intimidation.[249] In 2006 there were 57,307 arrests for domestic violence crimes, with 1,897 being for threat/intimidation.[250] Even though the specific number of cases that involved witness tampering either as an explicit or implicit motivation for the commission of the crime is not discernable based on these statistics alone, there is widespread recognition that domestic violence incidents often include a motivation for the abuser to keep the victim from cooperating with police.[251] In other words, the power dynamics in a relationship with domestic violence often permit the abuser to exert influence over the victim so that the victim no longer is willing or able to testify.[252] Therefore, the widespread domestic violence that exists in Florida creates a need for victimless prosecutions so that abuses are brought to justice within the confines of the constitutions of the United States and Florida.[253]

Turning to address the pervasive acceptance, and even encouragement, of witness tampering we can begin with whosarat.com.[254]

GANG INVESTIGATORS ASSOCIATIONS, 2005 NATIONAL GANG THREAT ASSESSMENT 4 (2005).

247 *See* FLORIDA DEPARTMENT OF LAW ENFORCEMENT, *supra* note 235.

248 *Id*.

249 *Id*. What can be gleaned from this statistic is limited because the UCR manual defines "intimidation" as: "unlawfully plac[ing] another person in reasonable fear of bodily harm through the use of threatening words and/or other conduct but without displaying a weapon or subjecting the victim to actual physical attack." *See* FEDERAL BUREAU OF INVESTIGATION, 1 UNIFORM CRIME REPORTING NATIONAL INCIDENT-BASED REPORTING SYSTEM: DATA COLLECTION GUIDELINES 23 (2000) at 30, *available at* http://www.fbi.gov/ucr/nibrs/manuals/v1all.pdf?file=/ucr/nibrs/manualsv1all.pdf (last visited Jan. 2, 2008). This does not specifically limit intimidation to witness tampering.

250 FLORIDA DEPARTMENT OF LAW ENFORCEMENT, *supra* note 235.

251 *See*, *e.g.*, Deborah Tuerkheimer, *A Relational Approach to the Right of Confrontation and Its Loss*, 15 J.L. & POL'Y 725, 729 (2007); King-Ries, *supra* note 235, at 458-60.

252 *See* King-Ries, *supra* note 235, at 458. Examples of this influence are not limited to threats, overt and implied; economic coercion is also often used. *Id.* at 458.

253 *See id.* at 458-60.

254 WHO'S A RAT, http://www.whosarat.com/aboutus.php (last visited Mar. 30, 2008).

This website, launched in 2004,[255] has been the subject of great scrutiny and litigation.[256] Many law enforcement personnel have considered whosarat.com to support witness tampering,[257] despite the website's official disclaimer of not supporting obstruction of justice.[258] Whosarat.com is just one example in the latest turn of culture towards accepting non-cooperation with the police. Another example is the *Stop Snitchin'* DVD and subsequent movement.[259] Most recently, the *Stop Snitchin'* movement was reported on by a local television network in Miami.[260] The report indicated that *Stop Snitchin'* had arrived in South Florida.[261] Police and prosecutors have observed that the new acceptance and encouragement of witness intimidation is hampering prosecutions.[262] The South Florida purveyor of t-shirts with the *Stop Snitchin'* message admitted that these t-shirts were meant to subvert the justice system; he said: "'[i]t's an implied threat, yes.'"[263]

Another example of a defendant engaging in witness tampering occurred in December 2007. Obie Johnson III, being prosecuted for conspiracy to distribute drugs, used his broad access to public records to obtain a copy of his co-defendant's interview with the police.[264] John-

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[255] *See* WHO'S A RAT, http://www.whosarat.com/aboutus.php (last visited Mar. 30, 2008).

[256] *See* Tim King, *Controversial Stop Snitching Website Identifies Informants Who Work With Police*, SALEM-NEWS, May 23, 2008, http://www.salem-news.com/articles/may232007/whosarat_52307.php (last visited Mar. 30, 2008); *see also* Jim Kouri, *Cops and Prosecutors Frustrated Over Witness Intimidation*, FLORIDA CHRONICLE, June 27, 2006, http://www.floridachronicle.com/articles/viewArticle.asp?articleID=10969 (last visited Mar. 30, 2008).

[257] *Id*.

[258] *See* WHO'S A RAT, http://www.whosarat.com/disclaimer.php (last visited Mar. 3, 2008).

[259] The website and self-proclaimed homepage of this phenomenon is http://stopsnitchin.com/flash/index.htm (last visited Feb. 24, 2008).

[260] *See Carmel on the Case: Stop Snitchin'* http://www1.wsvn.com/features/articles/carmelcase/MI41299 (last visited Feb. 24, 2008).

[261] *Id*.

[262] *See* Kouri, *supra* note 256; *Did Fear Help Two Killers Go Free? Prosecutor, Investigator Say Witnesses Balked; Defense Disputes Identification*, SUN-SENTINEL, Dec. 30, 2007, *available at* 2007 WLNR 25673895.

[263] See *Carmel on the Case: Stop Snitchin'*, *supra* note 260.

[264] Paul Pinkham, *Law & Disorder: Drug Dealer Pleads Guilty in Circulating of 'Snitch' Tape*, FLA. TIMES-UNION, Dec. 19, 2007, http://www.jacksonville.com/tu-online/stories/121907/met_226765964.shtml (last visited Mar. 30, 2004).

son then made hundreds of copies of this tape and released it into Jacksonville's drug community.[265] This tape came to be known under the moniker of *The Snitch Confession*.[266] Johnson was being prosecuted as part of an investigation that led to the arrest of at least sixteen other persons.[267]

This last instance is only the most recent example of defendants attempting to undermine the justice system by striking at the very heart of its machinery: witnesses. As can be seen, statistics singularly addressing witness tampering are not necessary for us to conclude that Florida's justice system is in need of assistance. There is an experiential basis for concluding that witness tampering is real and stands to systemically affect the pursuit of justice in Florida because of its widespread acceptance.[268]

This brings us now to the public policy reasons supporting the recognition and adoption of forfeiture by wrongdoing. Recognizing that there are real and numerous reasons that witness tampering is occurring, we should want to give to prosecutors all the legal tools that they may possess so that they may fairly prosecute crimes and combat witness tampering. By recognizing and adopting forfeiture by wrongdoing we can provide an additional means by which successful prosecutions for all kinds of crimes may be preserved. This recognition and adoption will also lead to those engaged in witness tampering being held responsible. Furthermore, recognizing and adopting forfeiture by wrongdoing will create a convincing disincentive for those who would engage in witness tampering. Without forfeiture by wrongdoing, criminals can receive a windfall for strategic witness tampering. Our sense of justice, fairness, and equity should not remain unruffled by this reality.

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265 *Id*.

266 *Id*.

267 *Id*.

268 *See id*.; *See also Carmel on the Case: Stop Snitchin'*, *supra* note 260.

B. The Unused, Unrecognized American Common Law Rule of Forfeiture by Wrongdoing—Florida Is Not In the Dark Regarding Constitutional Forfeiture

We begin with *Reynolds*. *Reynolds* was a constitutional law case based on the common law, deciding an issue regarding the Sixth Amendment.[269] The Sixth Amendment has been held to apply to Florida via the Fourteenth Amendment,[270] and Florida expressly construes its constitution's version of the Sixth Amendment consistently with interpretations of the Sixth Amendment from the United States Constitution.[271] Accordingly, even on this narrow basis, the common law derived from *Reynolds* instructs Florida on how to analyze confrontation claims. Again, the only question appearing to remain is how broadly the *Reynolds* opinion can be construed—was it intended to be limited only to the application of forfeiture by wrongdoing on its facts, or was it intended to pave the way for general applicability of the principle of forfeiture by wrongdoing?[272] The answer to this question does not need to be decided though, because there is a significant body of common law that should influence our understanding of just how much forfeiture by wrongdoing is already a part of Florida common law.

Let us begin with the most recent, and work our way backwards: "We reiterate what we said in *Crawford*: that 'the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.'"[273] In making this statement, the United States Supreme Court cited to *Reynolds*.[274] This statement and citation indicate that *Reynolds* is still alive in constitutional common law jurisprudence and that forfeiture by wrongdoing is a legal principle recognized by the United States Supreme Court. The Court furthermore wrote that in the

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269 *See* Reynolds v. United States, 98 U.S. 145, 152, 154, 158 (1878).

270 *See* Pointer v. Texas, 380 U.S. 400, 403 (1965).

271 *See* State v. Hosty, 944 So.2d 255, 259 n.4 (Fla. 2006) (citing Perez v. State, 536 So.2d 206, 209 n.4 (Fla. 1988)).

272 *See* Flanagan *supra* note 40, at 1208. One author credits the lack of citations to *Reynolds* as being the result of the ruling in *Mattox v. United States*, 156 U.S. 237 (1895), which did not rely on a waiver/forfeiture analysis and involved the use of prior sworn testimony. *See id.*

273 Davis v. Washington, 547 U.S. 813, 833 (2006) (quoting Crawford v. Washington, 541 U.S. 36, 62 (2004)).

274 *Id.*

context of an exception to the Confrontation Clause, Rule 804(b)(6) of the *Federal Rules of Evidence* codifies the rule of forfeiture by wrongdoing.[275] Assuming that the term codified was used purposely by the Court, this gives rise to the cogent inference that the United States Supreme Court implicitly was endorsing Rule 804(b)(6) as a constitutionally permissible form of forfeiture by wrongdoing.[276] Because this implicit conclusion arose in the context of the Court's ruling on the Sixth Amendment, it then means that this conclusion applies to Florida as part of its common law confrontation jurisprudence.

But there is more. What about all of the rulings by the federal courts on forfeiture by wrongdoing and its effect on the Sixth Amendment? These rulings cannot be ignored. Although courts of appeals differ on some issues regarding forfeiture by wrongdoing (such as whether specific intent is required), these were all rulings that relied on the common law.[277] It is important to recognize that this substantial common law basis for forfeiture by wrongdoing exists. This national common law heritage should make prosecutors less hesitant to argue for, and courts less hesitant to recognize and apply, forfeiture by wrongdoing.[278]

Furthermore, Florida's enactment of a statutory evidence code does not affect the conclusion that forfeiture by wrongdoing is already a part of Florida's constitutional common law. A legislative statute cannot restrain the interpretation or recognition of constitutional law.[279] Accordingly, the *Florida Evidence Code* cannot, and does not, restrain determinations regarding constitutional law. Florida is therefore free to

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[275] *Id.* at 833. *See generally* FED. R. EVID. 804(b)(6).

[276] Illinois already came to this conclusion. *See* People v. Stechly, 870 N.E.2d 333, 350 (Ill. 2007) (giving great weight to the *Davis* court's statement that 804(b)(6) "codifies the forfeiture doctrine.").

[277] *See* State v. Wright, 726 N.W.2d 464, 480-82 (Minn. 2007) (remanding for state to prove intent to procure witness unavailability). *Cf.* United States v. Garcia-Meza, 403 F.3d 364, 370 (6th Cir. 2005) (finding intent irrelevant to forfeiture by wrongdoing).

[278] This is, at least, regarding confrontation claims. Objections based on hearsay may be very different, as was discussed *supra* at Part. V.C. There may still need to be a hearsay exception for the out of court statements. *See* Vasquez v. People, 173 P.3d 1099, 1106 (Colo. 2007).

[279] *See* United States v. Houlihan, 92 F.3d 1271, 1279-81 (1st Cir. 1996).

recognize the common law constitutional doctrine of forfeiture by wrongdoing.

C. The English Historical Basis for Forfeiture by Wrongdoing in Florida Hearsay Law and Why It Is an Insufficient Basis for a Hearsay Exception

Florida, like other states that are former colonies, adopted a "receiving statute."[280] This statute incorporates into a state's jurisprudence a certain amount of the law that existed in England at the time of the statute's adoption.[281] Florida's receiving statute makes part of Florida's legal heritage all common and statutory law that existed in England as of July 4, 1776, except for that which is inconsistent with the constitutions of Florida and the United States and the legislative pronouncements of Florida.[282] Thus, the argument may be made that hearsay exceptions existing on July 4, 1776, as part of England's common or statutory law, are part of Florida's current jurisprudence.

Why should one explore the English basis for forfeiture by wrongdoing's place as part of Florida law? First, if this conclusion is correct, then forfeiture by wrongdoing is already part of Florida's common law, and thus, neither the courts nor the legislature of Florida need to take any further action to recognize the existence of the rule of forfeiture by wrongdoing. Second, even if there is insufficient support to definitively conclude that Florida's receiving statute incorporated the rule of forfeiture by wrongdoing, recognizing that there is support for the use of the rule of forfeiture by wrongdoing makes the use of this rule less novel, and thus should make practitioners and judges less wary of accepting its use.

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280 Michael Cavendish & Blake J. Hood, *Florida Common Law Jurisprudence*, 81 FLA. BAR J. 9, 9 (2007).

281 *See id.*

282 *See* FLA. STAT. § 2.01 (2007). This section reads:

> The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.

Id.

Baker v. State is instructive in analyzing whether there is support for the argument that the rule of forfeiture by wrongdoing is part of Florida's common law.[283] *Baker* was argued before Florida established an evidence code by statute.[284] The petitioner, Baker, sought a new trial after his conviction for robbery.[285] His basis was that the mother-in-law of another person, J. E. Johnson, said that J. E. Johnson admitted to her and her daughter that he had committed the crime for which the petitioner had been convicted.[286] In seeking a new trial, Baker argued that J. E. Johnson's statements were statements against penal interest and thus were not hearsay.[287] The trial court agreed, the First District Court of Appeals disagreed, but finally the Florida Supreme Court agreed with the respondent.[288]

The Florida Supreme Court, relying on Professor Wigmore's treatise, first looked to early English common law and found that statements against interest were freely admitted.[289] The court then, in a footnote, referred to Florida's receiving statute and used it as a basis for excluding from consideration a major change in English jurisprudence regarding statements against interest.[290] Beginning with this footnote and continuing throughout the rest of the analysis, the court used the receiving statute as a means of incorporating English common law on hearsay into Florida law.[291] Therefore, English common law on hearsay was incorporated into Florida's common law in 1829 when the Florida Legislature adopted section 2.01 of the *Florida Statutes*.[292] If it is established that the rule of forfeiture by wrongdoing was part of En-

283 *See generally* 336 So. 2d 364 (Fla. 1976).

284 *See* FLA. STAT. ch. 90 (2007).

285 *Baker*, 336 So. 2d at 366.

286 *Id.*

287 *Id.*

288 *See id.* at 366-70.

289 *Id.* at 367.

290 The Court cited to the Sussex Peerage case, which was an 1844 decision that limited the use of statements against interest to only statements injuring pecuniary or proprietary interests. The Court noted that this decision, though important and even widely accepted, was not necessarily part of Florida's common law via the receiving statute because the opinion was written after July 4, 1776. *See id.* at 366 n. 4.

291 *See id.* at 367-70.

292 *See* Cavendish & Hood, *supra* note 280, at 9. The amount of hearsay that was incorporated into common law is circumscribed by the Florida Evidence Code, FLA. STAT. ch. 90.

gland's common or statutory law on July 4, 1776, then the rule of forfeiture by wrongdoing should accordingly be considered part of Florida's common law.

Reynolds listed two cases that were decided before 1776 and were based on the common law.[293] The first is *Lord Morley's Case*.[294] In *Lord Morley's Case*, a witness went missing after his testimony had been taken by the coroner, and the witness was reported to have said that "Lord Morley's Trial was to be shortly but he would not be there."[295] The court held that if there was proof that the witness had been made absent through the actions of the defendant, then the witness's prior testimony could be admitted.[296] A second case that followed the rule announced in *Lord Morley's Case* is *Harrison's Case*.[297] In *Harrison's Case*, a statement by a witness to the coroner was at issue.[298] Since there was proof that the defendant made the witness absent, the statement to the coroner was admitted.[299] A third case, *Proceedings in Parliament Against Sir John Fenwick*, followed the same rule announced in *Lord Morley's Case*.[300] None of the cases explicitly stated that the defendant had to act with the specific intent of making the witness unavailable.[301] However, the observation is probably well made that the rule followed in these English cases is a narrow one, since each of the cases involved a situation where there was evidence that the defendant's intent in making the witness absent was to prevent the witness from testifying.[302]

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293 *See Reynolds*, 98 U.S. at 158.

294 6 State Trials 770 (1666).

295 *Id*. (internal quotations omitted); Flanagan, *supra* note 40, at 1204.

296 6 State Trials 770 (1666) (Eng.); s*ee also* John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L. Rev. 835, 889-90 (1996).

297 12 State Trials 833 (1692).

298 *See id.*

299 *Id*.; Flanagan, *supra* note 40, at 1204; Kroger, *supra* note 299, at 890-91.

300 *See* Flanagan, *supra* note 40, at 1204 (citing 13 How. St. Tr. 538 (H.C. 1696) (Eng.)).

301 *See* Lord Morley's Case, 6 State Trials 770, 776-77 (1666); *see also* Harrison's Case, 12 State Trials 833, 851 (1692). *See* also Friedman, *supra* note 40. This really only becomes an issue if the government seeks to rely on this argument for recognizing forfeiture by wrongdoing as a means to apply the "reflexive" form of forfeiture by wrongdoing.

302 *See* Flanagan, *supra* note 40, at 1204-05.

The *Reynolds* court stated that the rule in *Lord Morley's Case* "seems to have been recognized as the law in England ever since."[303] Because the rule that a defendant's procurement of the absence of a witness would render the prior testimony of that witness admissible in trial against him was a rule based on the common law of England and recognized before 1776, section 2.01 of the *Florida Statutes* appears to incorporate this rule into Florida law.[304] This means that the general principle of forfeiture by wrongdoing is already part of the common law of Florida, subject to debate about how broadly or narrowly the rule can be construed based on the English cases preceding 1776.

At first blush, the adoption of the *Florida Evidence Code* in 1976 does not appear to be an obstacle to this conclusion. After all, section 90.102 says that the common law is superseded only to the extent that it is inconsistent with the *Florida Evidence Code*, and no part of forfeiture by wrongdoing contradicts the *Florida Evidence Code*. This is not, for example, a situation where there is a statutory restriction on the use of hearsay that was non-existent at common law. However, a close reading of the hearsay section of the *Florida Evidence Code* provides the gravamen—specifically sections 90.802 and 90.804. Section 90.802 states that "[e]xcept as provided by *statute*, hearsay is inadmissible."[305] Section 90.804 addresses the hearsay exceptions applicable when the declarant is unavailable, which is also the only time that forfeiture by wrongdoing applies.[306] There is no provision in section 90.804 admitting hearsay when the party opposing the hearsay makes a declarant unavailable.[307] To use other terms, section 90.802 creates a class of statements called hearsay and renders upon this entire class the quality of inadmissibility, subject to statutory exceptions. The only statutory exceptions that create a sub-class of hearsay statements that become admissible when the declarant is unavailable are contained in section 90.804. Therefore, if Florida courts were to judicially recognize a hearsay exception based on the English common law of forfeiture by wrongdoing and the Florida receiving statute, they would be acting inconsistently with section 90.802 because the courts would be making

303 Reynolds v. United States, 98 U.S. 145, 158 (1878).

304 *See* FLA. STAT. § 2.01 (2007).

305 FLA. EVID. CODE § 90.802 (emphasis added).

306 *See* FLA. EVID. CODE § 90.804.

307 *See id.*

hearsay admissible without a statutory exception. The *Florida Evidence Code* did definitively, although perhaps unknowingly, disallow the use of the common law hearsay exception of forfeiture by wrongdoing.

D. What Forfeiture in Florida Should Be

Because both Florida caselaw and statutes are bereft of any specific contemplation of forfeiture by wrongdoing,[308] Florida has the advantage of a *tabula rasa* regarding forfeiture by wrongdoing. This means that Florida can get it right from the start, with the benefit of all the thought given in judicial opinions, statutes, rules, and scholarly articles addressing forfeiture by wrongdoing. Florida should begin by adopting a new evidentiary rule: section 90.804(2)(f). Adopting an amendment to the *Florida Evidence Code* will solve both constitutional, as well as statutory hearsay issues, and serve several beneficial ends.

First, this adoption will permit uniform application for forfeiture by wrongdoing. Such an evidentiary rule, as well as any accompanying committee notes, would indicate that the rule is intended to be used for analysis of extinguishment of confrontation and hearsay objections. Courts will not have disparate tests for what would constitute forfeiture by wrongdoing, let alone different justifications informing its use. The uniformity will aid litigators, particularly prosecutors, who bear the tremendous burden of retrying a case if there is a violation of one of the defendant's fundamental rights (like the right to confrontation). Predictability, always a significant goal in the creation of law, would be served.

Second, the uniform basis from which all Florida courts would start could expressly incorporate the rule's counterpart: section 804(b)(6) of the *Federal Rules of Evidence*. This adoption would also mean that all interpretations of Rule 804(b)(6) by federal courts, including the United States Supreme Court, would provide an accessible, already present basis for both judges and litigators to draw from when

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[308] *But cf.* Williams v. State, 947 So. 2d 517, 520 (Fla. Dist. Ct. App. 2006) (noting that, while the "Florida Evidence Code does not contain language that directly mirrors the Federal Evidence Code's forfeiture by wrongdoing provision . . . . Florida law does acknowledge that a party's wrongdoing may constitute waiver under certain circumstances.").

using forfeiture by wrongdoing in practice. Such access conceivably will make handling forfeiture by wrongdoing more efficient in Florida.

Third, by enacting a new evidentiary rule, Florida will be able to sidestep the issue of whether forfeiture by wrongdoing extinguishes, in addition to confrontation objections, hearsay objections. Considering the monumental shift in Sixth Amendment and hearsay jurisprudence that *Crawford* and *Davis* have been universally regarded as creating, Florida might wish to be wary of embarking on this novel course. Neither *Crawford* nor *Davis* answered the question of whether forfeiture by wrongdoing extinguished hearsay objections. What *Crawford* did say is that forfeiture by wrongdoing, while extinguishing confrontation claims, "does not purport to be an alternative means of determining reliability."[309] Therefore, it is currently unknown if the United States Supreme Court will require that there must be a hearsay exception for the unavailable witness's statements. Therefore, the issue is open as to whether Florida law, or the United States Constitution, will require a hearsay exception for the unavailable witness's statements. The proposed evidentiary rule could head off at the pass what would otherwise result in litigation.

Fourth, enacting forfeiture by wrongdoing as part of the *Florida Evidence Code* will represent Florida's commitment to the policy goals outlined in Subpart A above, as well as the seriousness that it takes to face the current threats to the justice system, which are also detailed in Subpart A. Codifying forfeiture by wrongdoing as part of the *Florida Evidence Code* will reflect the collective judgment of the people of Florida, acting through their elected representatives, that wrongdoers should not be able to benefit from their wrongdoing and that the people of Florida will not accept witness tampering. Further, since it is the common practice of the Florida Supreme Court to judicially adopt newly enacted evidence code provisions, the supreme court would have an opportunity to comment in an advisory capacity, should it wish to, about how forfeiture by wrongdoing should be handled in Florida.[310]

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[309] Crawford v. Washington, 541 U.S. 36, 62 (2004).

[310] *See* Michael P. Dickey, *The Florida Evidence Code and the Separation of Powers Doctrine: How to Distinguish Substance and Procedure Now that it Matters*, 34 STETSON L. REV. 109, 109 (2004). *See generally* In re Amendments to the Florida

Having discussed the reasons that Florida should adopt forfeiture by wrongdoing as an amendment to the *Florida Evidence Code*, we shall now look at what the specific contents of that rule should be, as well as some particular applications of that rule. Florida should adopt rule 804(b)(6) of the *Federal Rules of Evidence* as part of the *Florida Evidence Code*—specifically as section 90.804(2)(f). There is no dispute among the jurisdictions that the witness must be unavailable and that the defendant must be the cause of the unavailability. Therefore, there is no reason for Florida to be any different.

Regarding the differences among the jurisdictions, adopting the federal rule would have several advantages. First, Florida should use forfeiture by *wrongdoing* because *misconduct* already has a history as part of the official misconduct statute, which should not be confused with the precedent that will be set regarding forfeiture by wrongdoing.[311] Forfeiture is the preferable term because, as we have seen, it not only is the majority position but also better reflects the underlying policies of the concept embodied in forfeiture by wrongdoing. Using forfeiture would also mean that Florida courts would not have to use the legal charades of waiver analysis when analogizing cases as part of their application of forfeiture by wrongdoing. Also, using the term wrongdoing will not tie interpretation of the new statute to caselaw interpretations of misconduct under section 838.022 of the *Florida Statutes*.

Second, Florida should include *acquiescence* when codifying forfeiture by wrongdoing. This would mean that in Florida, a defendant could forfeit his or her confrontation and hearsay rights through affirmative action or acquiescence. Acquiescence is important to have as part of the forfeiture by wrongdoing rule because it better enables the rule to function as a tool for prosecuting conspiracies as well as when defendants tacitly condone the wrongful actions of their operatives. The inclusion of this term will be especially important when prosecuting gang crimes, which we have already seen are on the rise in Florida.

Florida should also join the majority position in requiring an intent to silence when forfeiture by wrongdoing is applied. This intent to

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Evidence Code, 782 So. 2d 339 (Fla. 2000) (discussing adoption of FLA. STAT. § 90.803(22)).

311 *See* FLA. STAT. § 838.022 (2007).

silence requirement could act to counterbalance the overzealous use of the acquiescence theory of forfeiture by wrongdoing. Including an intent to silence requirement will not preclude the *reflexive* use of forfeiture by wrongdoing; it will simply mean that the government will have a greater burden. Adopting an intent to silence requirement will also enable Florida to sidestep this controversial issue regarding forfeiture by wrongdoing, which may be advisable since the precedents are unclear regarding this issue.[312]

There is more to discuss regarding how Florida should apply the rule of forfeiture by wrongdoing. Beginning with the application of forfeiture by wrongdoing in the context of a co-conspirator's forfeiture, Florida could not rely solely upon the federal application of Rule 804(b)(6). Florida does follow the *Pinkerton* theory of reliability.[313] Thus, Florida would then have the benefit of the bulk of analysis in *Cherry*[314] *and Houlihan*,[315] which is a good reason for Florida to follow the co-conspirator analogy. However, Florida would likely have to break with the federal courts regarding the issue of bootstrapping during the determination of whether the government has proven forfeiture by wrongdoing. Florida expressly rejected *Bourjaily*,[316] which held that the co-conspirator's statement could be considered as evidence of the predicate conspiracy.[317] This rejection was premised upon Florida's Evidence Code not having a provision comparable to section 104(a) of the *Federal Rules of Evidence*, which does not require strict compliance with the rules of evidence when making preliminary determinations.[318] The Florida co-conspirator hearsay exception states the court must tell a jury that the conspiracy must be proven by independent evidence.[319] Further, there is an existing requirement that the court must rely upon independent evidence of a conspiracy, and a defendant's participation in it, before admitting co-conspirator statements.[320] Maintaining the co-

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312 *See supra* Part IV.D. This debate may soon be decided. See Giles v. California, 128 S.Ct. 976 (2008) (mem).

313 *See* Martinez v. State, 413 So. 2d 429, 430 (Fla. Dist. Ct. App. 1982).

314 United States v. Cherry, 217 F.3d 811 (10th Cir. 2000).

315 United States v. Houlihan, 92 F.3d 1271 (1st Cir. 1996).

316 Bourjaily v. United States, 483 U.S. 171 (1987).

317 *See* Romani v. State, 542 So. 2d 984, 986 (Fla. 1989).

318 *See id.* at 985-86; FLA. STAT. § 90.105 (2007).

319 *See Romani*, 542 So. 2d at 986.

320 *See id.*; FLA. STAT. § 90.803(18)(e) (2007).

gent analogy to co-conspirator hearsay analysis would therefore result in Florida not permitting consideration of an unavailable witness's statement as part of the evidence proving forfeiture by wrongdoing.

Keeping with the analogy to the co-conspirator hearsay exception, Florida should also set the standard of proof at preponderance of the evidence. This is the federal majority position and is the position taken in the *Federal Rules of Evidence*.[321] Further, the Florida Supreme Court adopted preponderance of the evidence as the standard of proof to be applied by trial courts when deciding if the government proved the necessary antecedents as part of the co-conspirator hearsay exception.[322] Using preponderance of the evidence as the standard of proof would also enable forfeiture by wrongdoing to be used as broadly as possible in organized crime or domestic violence cases, where it may be difficult for the government to discover evidence, but it will still allow the government to vigorously prosecute. Furthermore, the premise of the only counterargument, that a higher burden of proof would make sure that the evidence admitted is more reliable,[323] misunderstands how the burden of proof would affect the evidence admitted.[324] The quantum of proof available to prove the elements of forfeiture by wrongdoing—unavailability, action, intent, and causation—does not at all affect the reliability of an unavailable witness's statement. The statement of the unavailable witness could still have been made under circumstances that do not indicate reliability.[325]

Given the Florida Supreme Court's approach to admission of co-conspirator hearsay,[326] Florida should join the majority position and require pretrial hearings regarding forfeiture by wrongdoing. Florida

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321 *See, e.g.,* FED. R. EVID. 804(b)(6); People v. Giles, 152 P.3d 433, 446 (Cal. 2007), *cert. granted*, Giles v. California, 128 S. Ct. 976 (2008) (mem.) (noting that a majority of lower federal courts have determined that preponderance of the evidence is the appropriate standard of proof); *see also, e.g.,* State v. Ivy, 188 S.W.3d 132, 147 (Tenn. 2006) (determining that preponderance of the evidence is the appropriate standard of proof).

322 *See Romani*, 542 So. 2d at 986 n.3.

323 *See* People v. Geraci, 649 N.E.2d 817, 821 (N.Y. 1995).

324 *See* United States v. White, 116 F.3d 903, 912 (D.C. Cir. 1997).

325 *See id*.

326 *See Romani*, 542 So. 2d at 986 (requiring proof of a conspiracy and a defendant's participation in conspiracy before co-conspirator statements are admissible).

should require that during these hearings the courts conduct a reliability review of the evidence to ensure that it satisfies both due process and section 90.403 of the *Florida Statutes*.[327] This kind of review would be keeping in line with the *Crawford* court's observation that forfeiture by wrongdoing is not a means of assessing the reliability of statements and that due process requires that all admitted hearsay evidence must have at least minimal reliability.[328]

VI. Conclusion

Florida has the opportunity to reinvigorate its fight against violent and organized crime by arming its vanguard with the recently reaffirmed tool of forfeiture by wrongdoing. There is already a substantial basis in Florida common law for courts to recognize the constitutional dimension of forfeiture by wrongdoing by using precedent established by the United States Supreme Court, English common law, and other federal and state courts. However, the efficacy of forfeiture by wrongdoing will be substantially hampered without a corresponding statutory hearsay exception. Therefore, in order to achieve maximum protection for witnesses and to guard against interference with the justice system, Florida should adopt the following amendment to its evidence code with these attendant understandings:

Proposed Statute

> *Florida Statutes* § 90.804(2)(f)—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.

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[327] Courts conducting the analysis would need to be specific regarding the basis of their findings because such findings would affect the standard of review used on appeal. For example, if a court excluded the unavailable witness's statements on the basis of section 90.403, Florida Statutes (2007), then the appellate court would review for abuse of discretion. *See* Williams v. State, 967 So. 2d 735, 753 (Fla. 2007). However, if the court grounded its reasoning on due process grounds, then the appellate court would conduct de novo review because it would be reviewing a question of law. *See* D'Angelo v. Fitzmaurice, 863 So. 2d 311, 314 (Fla. 2003).

[328] Crawford v. Washington, 541 U.S. 36, 62 (2004).

Proposed Law Revision Council Notes/Florida Supreme Court Adoption Opinion

Section 90.804(2)(f) of the *Florida Statutes* is adopted with the recognition that the courts need an equitable means by which to protect the integrity of their proceedings as well as to deter conduct that is aimed at destroying the means by which the justice system functions. This codification tracks the Federal Rule of Evidence counterpart, Rule 804(b)(6). Although an intent to silence may not be constitutionally required, it is included in order to aid in restricting the application of this amendment to situations where the underlying policies supporting the rule also support its application. Prior to the introduction of a statement pursuant to this subdivision, the trial court must conduct a hearing where the state must prove each element by a preponderance of the evidence. The victim's statement may not be admitted as substantive evidence. During the hearing, courts should also conduct analysis using section 90.403 of the *Florida Statutes* to insure that the hearsay admitted has minimal reliability such that due process is not offended. Provided there is sufficient evidence to prove an intent to silence the witness, this rule may be applied to make a victim's hearsay admissible in proceedings where a criminal defendant is on trial for the murder of that victim. The wrongdoing perpetrated by the party opposing the admission of the hearsay need not be criminal. No additional subject matter limitation is imposed by this rule.