The Exclusion of Hearsay through Forfeiture by Wrongdoing—Old Wine in a New Bottle—Solving the Mystery of the Codification of the Concept into Federal Rule 804(b)(6)

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I. INTRODUCTION

The development of modern rules of evidence has been a process of putting old wine into new bottles. That is, many of the old common law rules and notions of evidence have been codified into modern day
state and federal evidence codes. This Article examines one such recent codification of a common law concept, forfeiture by wrongdoing, into the Federal Rules of Evidence and seeks to determine whether such codification was really necessary.

The Federal Rules of Evidence, used in federal courts and adopted by many states, Puerto Rico, and the military are a codification of many years of common-law evidence rules. The rules concerning hearsay have been codified in the Federal Rules of Evidence at Article VIII. The Rules recognize twenty-eight standard exceptions to the hearsay rule. In addition, a number of "nonhearsay" exceptions are also recognized. Furthermore, Congress adopted Rules 803(24) and 804(b)(5), as residual hearsay exceptions. These two rules allow introduction of hearsay statements not specifically covered by any of the named exceptions but having circumstantial guarantees of trustworthiness if the court determines that certain stated conditions are met.

In 1997, Congress amended the hearsay rules in two significant ways. First, the residual hearsay rules of Rule 803(24) and Rule 804(b)(5), were combined into one new Rule 807. Then, in 1997 Congress added a new provision, Rule 804(b)(6), which excluded forfeiture by wrongdoing from hearsay.

The new Rule 804(b)(6) provides:

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

2. See FED. R. EVID. 801-807.
3. See FED. R. EVID. 803(1)-(23), 804(b)(1)-(6).
4. See FED. R. EVID. 801(4).
5. See FED. R. EVID. 803(24), which reads as follows:

The following are not excluded from the hearsay rule, even though the declarant is available as witness:

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by the admission of statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including name and address of the declarant.

Federal Rule 804(b)(5) was identical in language except for its preamble which states "the following are not excluded by the hearsay rule if the declarant is unavailable as a witness."

(6) 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.\(^7\)

The promulgation of this new rule was another case of putting old wine into a new bottle. In common terms, the rule established the proposition that a defendant may not benefit from his or her wrongful prevention of future testimony from a witness or potential witness. According to its drafters Rule 804(b)(6) was intended as a prophylactic rule to deal with abhorrent behavior which strikes at the heart of the system of justice itself.\(^8\) That is, the killing of witnesses or other wrongdoing that might prevent a witness from testifying at trial.

The concept of forfeiture by wrongdoing of hearsay statements has existed as a policy argument in American law for over 100 years. The questions are: 1) Was it really necessary to codify the concept of forfeiture by wrongdoing into the Federal Rules of Evidence; and 2) If it was in fact necessary to do so, why did it take so long.\(^9\)

The purpose of this Article is to answer these two questions, by providing law students, prosecutors, defense attorneys, and other legal practitioners a contextual analysis of the forfeiture by wrongdoing concept. To accomplish this, the Article will survey the historical cases which first applied the forfeiture doctrine; examine the legislative history of the amendment; and then survey the reported cases since the 1997 Rule 804(b)(6) amendment.

II. HEARSAY, THE FEDERAL RULES, AND CONFRONTATION

A. Hearsay

In order to facilitate an understanding of the forfeiture by wrongdoing concept, a review of the definition of hearsay under the Federal Rules is helpful. The rules define a statement as “an oral or written assertion or nonverbal conduct of a person if it is intended by the person as an assertion.”\(^10\) Thus, hearsay under the rules is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”\(^11\) This definition is an affirmative one which says that an out of court assertion offered to prove the truth of the matter asserted is hearsay.\(^12\) Exceptions to the hearsay rule usually are justified on the ground that evidence meeting the requirements of the exception pos-

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8. See Fed. R. Evid. 804(b)(6) advisory committee notes.
9. Rule 804(b)(6) was adopted and became effective twenty-two years after the original adoption of the Rules.
sesses special reliability and often special need, such as the unavailability of the declarant. That is, there is an objective guaranty of trustworthiness to such statements.

The factors upon which the value of testimony depends are the perception, memory, narration and sincerity of the witness. In order to encourage witnesses to put forth their best efforts and to expose inaccuracies that might be present with respect to any of these factors, our trial system has developed what is known as the testimonial ideal. That is, witnesses are required to testify under oath, testify in person, and be subject to cross examination. The rule against hearsay is designed to insure compliance with these ideals. When one of them is absent, a hearsay objection becomes pertinent. Hearsay evidence is often characterized as unreliable and untrustworthy. Nevertheless courts admit hearsay evidence under the numerous exceptions found in the common law and in latter day statutes. Hearsay evidence exhibits a wide range of reliability. The effort to adjust the rules of admissibility of hearsay evidence to variations in reliability has been a major motivating factor in the movement to liberalize evidence law.

The exceptions that exhibit such guarantees of trustworthiness in Rule 804(b) before the 1997 amendment included: former testimony developed by direct, cross, or redirect examination; the dying declaration; statements of personal family history; and, of course, statements against interest.

B. The Federal Rules of Evidence

The purpose of the Federal Rules of Evidence is to secure fairness in administration of trials; eliminate unjustifiable expense and delay; and promote the growth and development of the law of evidence in order that truth may be ascertained and the proceedings justly determined. The Federal Rules of Evidence, adopted in 1975 for use in the federal courts and subsequently adopted by many states, have

13. See id. § 254.
14. See id. § 256.
15. Id. § 245.
16. Id.
17. Id.
22. See Fed. R. Evid. 102.
23. See id.
24. See id.
helped liberalize the introduction of trustworthy hearsay evidence at trials. 26

Forty-one states, Puerto Rico, and the military have adopted the Federal Rules of Evidence. 27 The majority of these states adopted rules of evidence based on the final Federal Rules of Evidence. 28 As the Federal Rules of Evidence are amended some states amend their corresponding rules to maintain similarity with the Federal Rules. 29 The following states have not adopted rules of evidence based on the Federal Rules: California, Connecticut, the District of Columbia, Georgia, Illinois, Kansas, Massachusetts, Missouri, New York, Virginia and the Virgin Islands. 30

The forty-one states, Puerto Rico, and the military that have adopted the Federal Rules have all adopted rules similar to the hearsay rule of 801. 31 However, Pennsylvania is the only State that has adopted the forfeiture by wrongdoing exception to the hearsay rule. 32

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26. Federal Rule of Evidence 102 provides that "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

27. See WEINSTEIN & BERGER, supra note 1, at tbl. T-1.

28. Id. at tbls. T2-T7: The Alabama Rules of Evidence became effective 1/1/96; Alaska Rules effective 8/1/79; Arizona Rules effective 9/1/77; Arkansas Rules effective 7/1/76; Colorado Rules effective 1/1/80; Delaware Rules effective 1/1/80; Florida Rules effective 7/1/79; Hawaii Rules effective 1/1/81; Idaho Rules effective 1/1/85; Indiana Rules effective 1/1/94; Iowa Rules effective 1/1/83; Kentucky Rules effective 1/1/92; Louisiana Rules effective 1/1/89; Maine Rules effective 2/2/76; Maryland Rules effective 1/1/94; Michigan Rules effective 3/1/78; Minnesota Rules effective 7/1/77; Mississippi Rules effective 1/1/86; Montana Rules effective 7/1/77; Nebraska Rules effective 8/24/75; Nevada Rules effective 1/1/71 (based on Preliminary Draft of the Federal Rules); New Hampshire Rules effective 1/1/85; New Jersey Rules effective 1/1/93; New Mexico Rules effective 1/1/73 (amended 7/1/76 to conform to the changes made to the draft Federal Rules by Congress); North Carolina Rules effective 7/1/84; North Dakota Rules effective 2/15/77; Ohio rules effective 7/1/80; Oklahoma Rules effective 10/1/78; Oregon Rules effective 1/1/82; Pennsylvania Rules effective 10/1/98; Puerto Rico Rules effective 10/1/79; Rhode Island Rules effective 10/1/87; South Carolina Rules effective 9/3/95; South Dakota Rules effective 7/1/78; Tennessee Rules effective 1/1/90; Texas Rules effective 3/1/98; Utah Rules effective 9/1/83; Vermont Rules effective 4/1/83; Washington Rules effective 4/2/79; West Virginia Rules effective 2/1/85; Wisconsin Rules effective 7/1/74 (based on Final Draft of the Federal Rules); Wyoming rules effective 1/1/78. The Military Rules of Evidence are based on the Federal Rules and were adopted 3/12/80.

29. Id. at tbl. T-1.

30. Id. at tbl. T-7.

31. Id. at tbl. T-106 to T-112.

32. Id. at tbl. T-155 to T-158.
C. Hearsay and Confrontation

The introduction of any hearsay statement, at least in the criminal law context, must be assessed in light of a defendant's right to confrontation under the Sixth Amendment. The Confrontation Clause does not operate as an absolute ban on hearsay evidence. If the declarant is unavailable and the statement bears adequate indicia of reliability, hearsay declarations may be received into evidence without violating a defendant's right to confrontation. These indicia of reliability may be proven either of two ways: 1) where the hearsay statement falls within a firmly rooted hearsay exception; or 2) where it is supported by a showing of particularized guarantees of trustworthiness.

Any defendant may voluntarily waive his right to confrontation. This is often done when a defendant enters a plea agreement. By entering this plea he relinquishes the right of confrontation. In addition, the Supreme Court has long held that a defendant's intentional misconduct can also constitute a waiver of rights under the Confrontation Clause. The doctrine that a defendant may waive or forfeit his constitutional right to confront witnesses was codified in 1997, as Rule 804(b)(6). Statements that would otherwise be inadmissible hearsay may be introduced into evidence “if 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.” This is forfeiture by wrongdoing. The next section will analyze the cases which utilized the doctrine of forfeiture before it was codified in the Federal Rules and will show that it was old wine ready to be placed into a new bottle.

III. THE HISTORIC FORFEITURE CASES

The historical examination of forfeiture by wrongdoing starts with the 1878 case of Reynolds v. United States. In Reynolds the U.S. Supreme Court was asked to review the constitutionality of Reynolds'
conviction for bigamy in the territory of Utah. Utah had not yet become a state.43

Among Reynolds' claims of error was that testimony given by a witness named Schofield at an earlier trial for the same offence, but under another indictment, was improperly admitted into evidence.44 Reynolds claimed he was not able to confront the witness at trial.45 The evidence revealed that the absent witness, Schofield, was actually Reynolds' second wife who had testified at an earlier trial for the same offense under a different indictment.46 The original subpoena for Ms. Schofield had been issued to her under the wrong name.47 When a court officer tried to serve the subpoena for Schofield, Reynolds told the officer she was not home and indicated that the witness would not appear at trial until served.48

Shortly thereafter it was discovered by the court officer that the wrong name had been on the original subpoena and a new one was issued. When the officer attempted to serve the second subpoena, he was told by Reynolds' first wife that Schofield had not been home for three weeks.49 The officer's inquiries around the neighborhood proved fruitless. Upon hearing this information the territorial court allowed Schofield's testimony from the earlier trial to be admitted in the case.50 The Court found that there was sufficient evidence to show that Reynolds had been instrumental in concealing or keeping the witness away from the trial.51

The Court found no error with the introduction of the earlier testimony under the circumstances. The Court specifically held that "the Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on the privilege."52 The Court further held if the witness was absent by the procurement of the accused, said witness' evidence supplied in some legal way would not violate the right to confrontation.53 This has come to be known as forfeiture by wrongdoing.

The Court reviewed the history of forfeiture by wrongdoing and found:

43. Id. at 146.
44. Id. at 153.
45. Id. at 158.
46. Id. at 159.
47. Id.
48. Id. at 160.
49. Id.
50. Id.
51. Id. at 158.
52. Id.
53. Id.
In Lord Morley's Case as long ago as the year 1666, it was resolved in the house of Lords "that in case oath should be made that any witness, who had been examined by the coroner and was then absent, was detained by the means or procurement of the prisoner, and the opinion of the judges asked whether such examination might be read, we should answer, that if their lordships were satisfied by the evidence they had heard that the witness was detained by means of procurement of the prisoner, then the examination might be read; but whether he was detained by means or procurement of the prisoner was matter of fact, of which we were not the judges, but their lordships." This resolution was followed in Harrison's Case and seems to have been recognized as the law in England ever since. In Regina v. Scaife, all the judges agreed that if the prisoner had resorted to contrivance to keep a witness out of the way, the deposition of the witness, taken before a magistrate and in the presence of the prisoner, might be read. Other cases to the same effect are to be found, and in this country the ruling has been the same way. . . . So that now, in the leading text-books, it is laid down that if a witness is kept away by an adverse party, his testimony, taken on a former trial between the same parties upon the same issues may be given in evidence.\(^5\)

The Court explained that the foundation for the rule is the maxim that no one shall be permitted to take advantage of his own wrong. The Court believed the maxim grew out of the principles of common honesty, and when properly administered would harm no one.\(^5\) The Court, therefore, affirmed Reynolds' conviction for bigamy.\(^5\)

In 1912, the Supreme Court relied on its reasoning in Reynolds to affirm the conviction of the defendant in Diaz v. United States.\(^5\) In Diaz the Court reviewed the conviction on appeal from the Supreme Court of the Philippines. Diaz was originally tried and convicted for assault and battery upon Cornelio Alcanzaren.\(^5\) This was a misdemeanor for which he was fined. Alcanzaren subsequently died as a direct result of the injuries inflicted by Diaz.\(^5\) Diaz was then indicted for the homicide of Alcanzaren. He was found guilty of the homicide, a felony, and given a term of imprisonment.\(^6\)

During the homicide trial Diaz was represented by counsel. However, on two occasions Diaz sent word to the trial court that he would not attend the proceedings and that they should commence without him, but in the presence of his lawyer.\(^6\) Testimony from Diaz's misdemeanor trial was admitted at the homicide trial.\(^6\) Upon his convic-

54. Id. at 158-59 (citations omitted).
55. Id. at 159.
56. Id. at 168.
57. 233 U.S. 442 (1912).
58. Id. at 444.
59. Id.
60. Id.
61. Id. at 453.
62. Id. at 449.
tion Diaz appealed on grounds of double jeopardy and a violation of his rights to confront the witnesses against him.

The Court found insufficient merit in Diaz's confrontation argument. The Court found that it was Diaz, and not the prosecution, who had introduced testimony from the assault and battery trial. There had been no objection to the introduction of the testimony by the government. In some respects the earlier testimony had been helpful to Diaz, as well as to the prosecution. The Court, citing Reynolds, stated:

The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntary keeps the witnesses away, he cannot insist on the privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

Based upon the Reynolds rationale, the Court held that Diaz had "by his voluntary act, placed in evidence the testimony disclosed by the record in question, and thereby sought to obtain an advantage from it, he waived his right of confrontation as to that testimony and cannot now complain of its consideration." The conviction was affirmed.

In 1934, the Supreme Court again acknowledged the concept of forfeiture by wrongdoing in Snyder v. Massachusetts, where Snyder was convicted of a murder which grew out of an attempted armed robbery of a filling station by him and two codefendants. During trial the government moved the court to have the jury view the scene of the crime. Synder moved to be at the viewing with the jury. The court denied his request. In dicta the Court, in a decision written by Justice Cardozo, alluded to Synder's rights to confront witnesses during

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63. The Court found no merit to the double jeopardy claim. The Court held:

The homicide charged against the accused in the court of first instance and the assault and battery for which he was tried before the justice of the peace, although identical in some of their elements, were distinct offenses both in law and in fact. The death of the injured person was the principal element of the homicide, but was no part of the assault and battery. At the time of trial for the latter the death had not ensued, and not until it did ensue was it possible to put the accused in jeopardy for that offense.

Id. at 449.

64. Id.

65. Id.

66. Id. at 450.

67. Id.

68. Id. at 452 (citing Reynolds, 98 U.S. at 158).

69. Id. at 452-53.

70. Id. at 459.

71. 291 U.S. 97 (1934).

72. Id. at 102-03.

73. Id. at 103-04.
every phase of the trial, including a viewing of the crime scene by the jury, and stated "a prosecution in the federal courts in such circumstances also we make a like assumption as to the scope of the privilege created by the Federal Constitution . . . . No doubt that the privilege may be lost by consent or at times by misconduct."74 Although Synder's conviction was affirmed, the ruling was subsequently overruled on other grounds.75

In 1970, the Supreme Court expanded the concept of forfeiture of confrontation rights by wrongdoing to defendants who engaged in disruptive and disrespectful conduct in the courtroom. In Illinois v. Allen,76 the defendant on trial for armed robbery repeatedly disrupted the trial by abusive behavior and language toward the trial judge despite warnings from the trial judge. The defendant Allen was subsequently removed from the courtroom during the State's case in chief.77 After a promise to discontinue his misconduct, Allen was allowed to remain in the courtroom during presentation of his defense case by his attorney.78 After his conviction and subsequent state appeals, Allen filed a writ of habeas corpus to the federal court alleging that he had been denied his right to confrontation by being removed from the courtroom.79 The Seventh Circuit Court of Appeals agreed, holding that Allen's Sixth Amendment right to be present at his trial was absolute. It, therefore, reversed his conviction.80

The Supreme Court disagreed with the reasoning of the Seventh Circuit Court of Appeals and instead accepted Justice Cardozo's statement in Synder v. Massachusetts that the privilege of confronting the witnesses may be lost by consent or misconduct.81 The Supreme Court reversed the Seventh Circuit stating:

[we] explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings . . . .82

The concept of forfeiture of confrontation rights was also affirmed in the 1982 case of United States v. Mastrangelo,83 in which the Sec-

74. Id. at 106.
77. Id. at 340.
78. Id. at 341.
79. Id.
80. Id. at 342.
81. Id. at 343.
82. Id.
83. 693 F.2d 269 (2d Cir. 1982).
Mastrangelo had been convicted of conspiracy to possess with intent to distribute marijuana and methaqualone tablets and importation of marijuana and methaqualone tablets. The court noted that "[t]he sole link between Mastrangelo and the drug conspiracy was evidence of his purchase of four trucks which were seized by narcotics agents while loaded with the drugs." The only witness to the purchase of the truck was James Bennet. Bennet testified in the grand jury that he sold Mastrangelo the trucks under suspicious circumstances. Bennet further identified a tape recording wherein, a few months before, Mastrangelo threatened him if he identified Mastrangelo to the grand jury as the purchaser of the trucks.

On the third day of Mastrangelo's trial, Bennet was shot and killed by two men as he left his home en route to the court house to testify. A mistrial was declared. At Mastrangelo's subsequent retrial on the indictment, the government was allowed to introduce, pursuant to the residual exception of the hearsay rule, Bennet's grand jury testimony concerning Mastrangelo. Mastrangelo objected on grounds that such hearsay violated his confrontation rights under the Sixth Amendment. The trial judge allowed the testimony on the ground that the testimony "was surrounded with sufficient particularized guarantees of trustworthiness to overcome [C]onfrontation [C]lause objections . . . ." On appeal the Second Circuit acknowledged the concept of forfeiture by wrongdoing of one's Confrontation Clause rights as set out in Supreme Court cases. The court took the position that if Mastrangelo had been involved in Bennet's death, his involvement would work a waiver of his Confrontation Clause objections to the admission of Bennet's testimony. Nevertheless, the court remanded the case to the district court for an evidentiary hearing on the question of Mastrangelo's involvement in the murder of Bennet. The court believed

84. Id. at 270.
85. Id. at 271.
86. Id.
87. Id.
88. Id.
89. The trial judge declared a mistrial as to Mastrangelo and subsequently denied his motion to bar re-prosecution on the basis of double jeopardy on grounds that he believed that Mastrangelo, being the only person to benefit from Bennet's death, had either ordered the murder or acquiesced in it. See id.
90. Id. at 272.
91. Id.
92. Id.
93. Id.
94. Id.
that an evidentiary hearing in the absence of the jury was necessary
before a finding of waiver could be made.\textsuperscript{95}

The court further held that a preponderance of the evidence stan-
dard of proof was the correct burden to apply to the government in a
claim of waiver by misconduct.\textsuperscript{96} The court reasoned that such a
claim of waiver was not one which was "either unusually subject to
deception or disfavored by the law."\textsuperscript{97} The court found,

[l]o the contrary, such misconduct was invariably accompanied by tangible
evidence such as the disappearance of the defendant, disruption in the court-
room, or the murder of a key witness, and [that] there [was] hardly any reason
to apply a burden of proof which might encourage behavior which struck at
the heart of the system of justice itself.\textsuperscript{98}

The cases of Reynolds and Diaz involved wrongdoing by defendants
but not a violent crime against the declarant. Synder, which was sub-
sequently overturned, considered the defendant's murder of the victim
sufficient for forfeiture. In Allen the forfeiture was brought about by
the deliberate conduct of the defendant in disturbing the process of
the trial. Mastrangelo, the first of the major forfeiture cases decided
after the adoption of the Federal Rules of Evidence, considered a cir-
cumstance where extreme violence was committed to prevent the de-
clarant from testifying. Perhaps this case was a prelude to the
modern era where criminal defendants are more prone to use violence
to prevent witness testimony.

The language and rationale of Mastrangelo seemed to have had a
profound impact on the drafters of the 1997 amendment which
brought us Rule 804(b)(6), the modern forfeiture of wrongdoing excep-
tion to the hearsay rule.\textsuperscript{99} This raises the question of "why" it took
such a long time to codify the rule. Mastrangelo was decided by the
Second Circuit in 1982. As we shall see from the legislative history in
the next section, it was not until 1992, ten years later, before the rule
was even proposed. Was it really necessary to recommend codification
at that time? Was it necessary to put this old wine in a new bottle?

95. \textit{Id.} at 273.
96. \textit{Id.}
97. \textit{Id.}
98. \textit{Id.}
99. \textit{See} Advisory Committee Notes to the 1997 Amendment of Rule 804(b)(6), which
notes that Rule 804(b)(6) has been added to provide that a party forfeits the right
to object on hearsay grounds to the admission of a declarant's prior statement
when the party's deliberate wrongdoing or acquiescence therein procured the un-
availability of the declarant of a witness. This recognizes the need for a prophyl-
actic rule to deal with abhorrent behavior "which strikes at the heart of the
R. Evid.} 804(b)(6).
IV. THE LEGISLATIVE HISTORY OF THE CODIFICATION OF RULE 804(b)(6)

At first glance, the legislative history of the enactment of Rule 804(b)(6) appears slim and sketchy. A more detailed investigation provides better answers as to "why" it may have been necessary to codify the concept of forfeiture into the Rule and why it took so long. The legislative history is, therefore, very valuable.

The legislative history of Rule 804(b)(6) reveals that in April of 1992, Professor Stephen Saltzburg, and Professor David Schlueter, both members of the Criminal Rules Committee of the Advisory Committee in Rule of Evidence, considered and approved the rule for adoption. The history further reveals that in July of 1995, the Rule was approved for publication by the Judicial Conference Committee on Rules of Practice and Procedure.

The Rule was then published for public comment in September, 1995. Later, in April of 1996, the Rule and comments received thereon were considered and submitted to the Judicial Conference Committee on Rules of Practice and Procedure for transmittal to the Judicial Conference. In June of 1996, the Rule was approved by the Judicial Conference Committee. Finally, the Rule was approved by the full Judicial Conference in September, 1997 and approved by the U.S. Supreme Court in April of 1997. Rule 804(b)(6) then became effective in December 1997.

Although this presents an interesting chronology, it does little to solve the mystery of why the codification and why then. Could the answer have been that starting in 1992 when the Criminal Rules Committee first proposed the rule that crime had become more violent or that more witnesses in ongoing trials were being killed or prevented from testifying by forms of intimidation? There is little statistical data on this found in the legislative history.

Professor Stephen Saltzburg, one of the original committee members who considered and proposed adoption of Rule 804(b)(6) in 1992, is not surprised that there is little legislative history concerning the

101. This Committee is also called the Standing Committee and is abbreviated in the legislative history documents as ST CMTE. See id. at n.99.
102. See id.
103. See id.
104. Id.
105. Id.
106. Id.
107. Id.
amendment.  He states that there was little or no opposition to the amendment by the committee. Although his memory of the history of the amendment is now sketchy, it was his perception that at the time of the proposal in 1992, there had been an increase in federal trial witnesses being killed or intimidated into not testifying. He also believes there may have been some pressure from Department of Justice representatives on the committee for the new rule. As to the mystery of why the amendment was proposed in 1992 and not 1982, shortly after the *Mastrangelo* case, Professor Saltzburg could only opine that "it simply seemed like the right thing to do at the time."

Although Professor Saltzburg's memory concerning an increase in witness intimidation in federal criminal trials may be accurate, it provides only anecdotal evidence. Actual crime statistics maintained by the Department of Justice indicate that violent crime dropped throughout most of the decade of the 1990s. The actual statistics reveal that violent crime in the U.S. decreased from "1.5 million violent crimes in 1998 to approximately 1.4 million in 1999, a drop of nearly 7 percent." Further, "[t]he 1999 number represents the lowest violent crime total recorded since 1985." Moreover, the total shows "a decline of 20 percent from the 1995 level and a 21 percent drop from the 1990 level."

Yet another Department of Justice Study found evidence that there had indeed been an increase in witness intimidation starting in the late 1980s and continuing into the 1990s. A number of prosecu-

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108. Telephone Interview with Stephen Saltzburg, Howrey Professor of Trial Advocacy and Director of the LL.M. Program in Litigation and Dispute Resolution, George Washington School of Law, Washington, D.C. (Nov. 16, 2001).
109. *Id.*
110. *Id.* Professor Saltzburg, who lives in Washington, D.C. recalls that in the early to mid 1990s federal prosecutors in Washington, D.C. were involved in a number of high profile criminal prosecutions in which witnesses were allegedly killed or intimidated. These included the Rayful Edmund trial, the R Street Gang trial, and the P Street Crew prosecution. Professor Saltzburg recalls that the author of this Article had been appointed by the federal court to be lead defense counsel in the 1992 R Street Gang trial.
111. *Id.* Mary F. Harkenrider, Esq. and Roger Pauley, Esq., served as the U.S. Department of Justice representatives to the Advisory Committee on Evidence Rules.
112. *Id.*
114. *Id.* at 11.
115. *Id.*
116. *Id.*
118. *Id.* at 2.
tors linked this increase in violent victim and witness intimidation to the advent of gang-controlled crack sales in the mid to late 1980s. Several prosecutors estimated that victim and witness intimidation is suspected in up to 75-100 percent of the violent crimes committed in some gang-dominated neighborhoods. A National Institute of Justice assessment found that "51 percent of prosecutors in large jurisdictions and 43 percent in small jurisdictions said that intimidation of victims and witnesses was a major problem . . . ." An additional 30 percent of prosecutors in large jurisdictions and "25 percent in small jurisdictions labeled intimidation a moderate problem."

There had been federal efforts to combat such witness intimidation starting in the late 1960s and culminating in the Organized Crime Control Act of 1970. "In 1982, the Victim and Witness Protection Act expanded federal laws regarding witness security and victim services by establishing significant penalties for witness tampering, intimidation and harassment." This included the new obstruction of justice laws of 18 U.S.C. § 1512 and 18 U.S.C. § 1513.

So there is some statistical evidence from the Department of Justice that shows an increase in witness intimidation starting in the late 1980s. Such evidence still does not answer our questions concerning codification of Rule 804(b)(6)—"why the codification" and "why then"?

The best answers to these questions came in an interview with John K. Rabiej, the long time Chief of the Rules Committee Support Office at the Administrative Office of the U.S. Courts in Washington, D.C. Attorney Rabiej, when questioned on his opinion as to why the codification of 804(b)(6) and why in the mid 1990s, indicated that the answer was simple. It all had to do with Circuit Judge Ralph K. Winter, Jr. Circuit Judge Ralph K. Winter, Jr. became Chairman of the Advisory Committee on Evidence Rule in late 1994. This was significant because Judge Winter of the Second Circuit is the same Judge Winter who wrote the 1982 opinion in U.S. v. Mas-
Attorney Rabiej, who attended all the Advisory Committee meetings, remembers Judge Winter telling members of the Advisory Committee that the killing of the witness Bennet in the Mastangelo case affected him deeply and led the judge to believe that the long-standing concept of forfeiture should be codified in the Federal Rules.132

In substance, Attorney Rabiej provided notes from Judge Winter’s first Advisory Committee meeting as Chairman, held January 8 and 10, 1995.133 With respect to Rule 804, the notes provide:134

[t]he Committee also wished consideration of whether the present language in the last sentence of subdivision (a) should be amended to cover issues raised by opinions such as United States v. Mastangelo when the defendant has prevented the declarant from testifying.135

Later in 1995, the Advisory Committee met again136 and the minutes reflect Judge Winter’s interest in seeing the concept of forfeiture codified. The minutes of that meeting provide, in relevant part:

Waiver by misconduct. The Committee next considered whether it should codify the generally recognized principle that hearsay statements become admissible on a waiver by misconduct notion when the defendant deliberately causes the declarant’s unavailability.

. . . . The Committee agreed that codifying the waiver doctrine was desirable as a matter of policy in light of the large number of witnesses who are intimidated or incapacitated so that they do not testify. Consequently, the Committee chose a version of the rule that would not require having to show that the defendant actively participated in procuring the declarant’s unavailability.

. . . . In addition, the Committee rejected imposing a “clear and convincing” burden of proof on the prosecution, as is required in the Fifth Circuit, in favor of the usual preponderance of the evidence standard used in connection with preliminary questions under Rule 104(a), even when a constitutional rule is at issue.137

The minutes of the next meeting of the Advisory Committee138 related that public comments that were received generally approved of the proposed amendment.139 At the Committee On Rules of Practice

131. Id.
132. Id.
134. Id. at *5 (citation omitted).
135. Id. at *6.
137. Id. at *4.
138. This meeting was held on April 22, 1996 in Washington, D.C.
and Procedure in 1996, Judge Winter pointed out to this full committee that the proposed new Rule 804(b)(6), labeled "forfeiture by wrongdoing," would address the problem of witness tampering. According to Judge Winter, "[i]t would provide that a party who has engaged in, or acquiesced in, wrongdoing intended to procure the unavailability of a witness forfeits the rights to object on hearsay grounds to admission of the prior statements of the witness." Judge Winter further explained to the Committee that his advisory committee deliberately had chosen the broad terms "acquiesce" and "wrongdoing" to avoid both over inclusion and under inclusion and to leave room for common sense interpretation by the courts. The Judge added that "Rule 403 was applicable and allowed a judge to exclude any evidence that was unreliable or prejudicial." The Committee voted with one exception to approve the proposed amendment and to send it on to the Judicial Conference. As discussed earlier in this Article, the Judicial Conference approved of the Amendment in September of 1996. The Supreme Court approved the Amendment in April 1997, and it became effective in December of 1997.

Thus, the mystery is resolved. Our questions as to the why and when of the codification are answered. The answers may be summed up by a confluence of timing and coincidence. The judge who wrote the opinion in a case in which a witness was killed to silence him—Judge Winter—several years later became the chairman of the Advisory Committee on the Federal Rules. In a very real sense Rule 804(b)(6) can be viewed as a legacy to a Circuit court judge who believed as a matter of policy that our hearsay rules of evidence needed "a prophylactic rule to deal with abhorrent behavior which strikes at the heart of justice itself." Thus, the answer to the "why" question

141. Id. at *25.
142. Id.
143. Id. at *26.
144. Federal Rule 403 provides the following: "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.
146. Id.
147. See supra notes 104-106 and accompanying text.
148. See supra text accompanying note 106.
149. See supra text accompanying note 107.
150. See Mastrangelo, 639 F.2d at 273.
of codification of the forfeiture rule came about is because a jurist who saw that in the modern era of codified evidence rules, such a prophylactic rule was exigent and needed to be spelled out. The "why then" question of the codification is answered by the fact that Judge Winter became the Chairman of the Advisory Committee in the mid 1990s when witness intimidation seemed to be on the rise. As Chair of the Advisory Committee the minutes of his meetings reveal that he was a strong advocate for the codification of the forfeiture by wrongdoing rule.

By exploring and analyzing the legislative history of Rule 804(b)(6), one can better understand how the old wine of forfeiture by wrongdoing came to be put in its new bottle of the Federal Rules. In the next section this Article will analyze how the newly bottled old wine of Rule 804(b)(6) has worked in the reported cases since the amendment of 1997. This review evaluates whether it was truly necessary to codify the rule.

V. FORFEITURE CASES SINCE THE 1997 AMENDMENT

The forfeiture by wrongdoing rule of 804(b)(6) has been cited in federal cases from the Second, Fourth, Seventh, Eighth, and Tenth Circuit Courts of Appeal since the 1997 amendment. In United States v. Dhinsa, the Second Circuit reviewed the racketeering, conspiracy, and murder convictions of Gurmeet Singh Dhinsa. Dhinsa was the leader of the Singh Enterprise, a racketeering organization centered around a chain of gasoline stations owned and operated by Dhinsa throughout the New York City area. The criminal enterprise was funded by a gasoline pump rigging scheme that overcharged customers through the use of an elaborate electronic device located beneath the gasoline pumps at the various stations owned and operated by Dhinsa. Operated by remote control, the rigging mechanism overcharged each customer six to seven percent on each purchase. During the enterprise's ten year existence, the pump rigging scheme generated tens of millions of dollars, which were used to bribe public officials, purchase weapons, and carry out other crimes of violence aimed at protecting the enterprise's operation and profits.

Among Dhinsa's claims on appeal were evidentiary issues involving Rule 804(b)(6). Dhinsa argued that admitting out of court statements of Manmohan and Satinderjit, former employees who

151. 243 F.3d 635 (2d Cir. 2001).
152. Id. at 642.
153. Id.
154. Id. at 643.
155. Id.
156. Id. at 650.
Dhinsa had order killed before they could cooperate with police, was error. 157 Specifically, Dhinsa objected to the hearsay statements introduced as proof of the declarants’ murders rather than as proof of past events or offenses. 158 Dhinsa alleged that introduction of such evidence violated Federal Rule 403, 159 Rule 802 160 and his right to confront the witnesses against him under the Sixth Amendment. 161

The court dispatched each of Dhinsa’s arguments and upheld his convictions. The court, citing Mastrangelo 162 and Diaz, 163 held that there was no violation of his right to confront the witness and reaffirmed the principle that a defendant who wrongfully procures the silence of a witness will have waived his Sixth Amendment rights and waived his hearsay objections. 164 With respect to the subject matter limitation of the Rule, the Second Circuit found the plain language of the rule and the strong policy reasons favoring application of the waiver by misconduct doctrine dispositive. The court concluded that these factors placed no limitation on the subject matter of the declarant’s statement which could be offered against the defendant at trial. 165 The court did, however, suggest that the trial judge should undertake a balancing of probative value against prejudicial effect in accordance with Rule 403, in order to avoid the admission of facially unreliable hearsay. 166

The Second Circuit also held, consistent with their pre-Rule 804(b)(6) precedent, that prior to finding that a defendant waived his confrontation rights with respect to an out of court statement by an actual or potential witness, the trial court must hold an evidentiary hearing outside of the presence of the jury. 167 Furthermore, at this hearing the government has the burden to prove by a preponderance of the evidence that the defendant was involved in, or responsible for procuring the unavailability of an actual or potential witness. 168

157. Id.
158. The court labels this subject matter limitation.
159. See supra note 145.
160. Federal Rule 802 provides the following: “[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.” Fed. R. Evid. 802.
161. See Dhinsa, 243 F.3d at 650.
164. Dhinsa, 243 F.3d at 652 (citations omitted).
165. Id. at 653.
166. Id. at 654 (citing United States v. Miller, 116 F.3d 641, 668 (2d Cir. 1997)).
167. In making this ruling the Second Circuit did note that the Eighth Circuit case of United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999), held that 804(b)(6) did not require the trial court to hold a hearing outside of the presence of the jury.
168. Id.
A year earlier, the Fourth Circuit considered a Rule 804(b)(6) evidentiary objection in *United States v. Johnson.* In *Johnson*, Shaheem and Raheem Johnson, identical twin brothers, were convicted on nineteen counts related to their drug conspiracy, in furtherance of which they murdered five people. The Johnsons argued that the trial court erred by not excluding hearsay statements allegedly made by Shawn Thomas regarding Raheem's involvement in the murder of Antonio Stevens. Thomas was unavailable to testify at trial because Raheem murdered him before the trial. Three witnesses testified that Thomas told them that he was with Raheem when Raheem murdered Stevens.

Raheem Johnson argued that the trial court should have conducted a hearing to confirm by clear and convincing evidence that Raheem did cause Thomas' unavailability. The court found such standard unnecessary under 804(b)(6), noting that it was not necessary to hold such hearing and finding that the court could admit the evidence contingent upon proof of the underlying murder by a preponderance of the evidence.

Raheem also argued that even if Rule 804(b)(6) waived his right to object to the fact that Thomas was not available for cross examination, the hearsay testimony must be otherwise admissible as if Thomas was available to testify. The court did not accept this argument and found even if they were to conclude that in order to admit statements under Rule 804(b)(6), the statements must be of such a nature that they would be admissible if the unavailable witness were available to testify, Raheem had not articulated how such a requirement would have made Thomas's statements inadmissible. In short, the court found that Thomas had first hand knowledge of Raheem's murder of Stevens and could have testified to this had Raheem not murdered Thomas. Such testimony would not have been inadmissible. The court affirmed the convictions and found that with respect to Rule 804(b)(6), the trial court had not abused its discretion in holding that

169. 219 F.3d 349 (4th Cir. 2000).
170. *Id.* at 352.
171. *Id.* at 355.
172. *Id.*
173. *Id.* at 356.
174. *Id.* However, the Fourth Circuit found that the district court judge had held a lengthy conference outside of the jury's presence to discuss the admission of Thomas' hearsay. At the time Raheem's counsel did not request a separate evidentiary hearing and did not contest that Raheem killed Thomas to prevent him from testifying specifically about Stevens' murder.
175. *Id.*
176. *Id.*
177. *Id.*
Raheem had forfeited his hearsay objections since he had caused the unavailability of the witness.  

In the same year as Johnson, the Seventh Circuit, after reviewing the facts in United States v. Ochoa, held that admission of certain hearsay statements pursuant to Rule 804(b)(6) was improper. In Ochoa, the defendant appealed his conviction for conspiracy to commit mail fraud. The conspiracy stemmed from Ochoa's efforts to ease pressing financial debt problems. He had reported his automobile stolen to avoid making the payments. Ochoa asked McLaughlin, a tenant in his home, if he knew anyone who could help him make his car disappear. McLaughlin suggested that Strange, his brother-in-law, could dispose of the car. Strange did set up a situation to dispose of the car, but did not know that it was through an FBI undercover operation. Ochoa reported the car stolen and insurance proceeds were fraudulently obtained, which allowed Ochoa's auto loan to be paid off in full. Ochoa and Strange were indicted shortly thereafter. Subsequently, Strange entered into an agreement to plead guilty and testify against Ochoa.

McLaughlin, who by this time had moved out of Ochoa's house, was asked to testify at trial in exchange for not being charged in the conspiracy. McLaughlin had told Agent May of the FBI about Ochoa's plan to dispose of his automobile. Although McLaughlin agreed to testify, when the trial began McLaughlin could not be located. During their search for McLaughlin, the FBI learned that McLaughlin had made seven phone calls from Ochoa's residence to his former employer during the two weeks before the trial began. At trial, the prosecution relied on Strange's testimony as well as an undercover FBI agent's testimony. Over objection by Ochoa, the government also introduced statements of McLaughlin through Agent May. The trial court ruled that Ochoa had forfeited his objection to such hearsay by his own wrongdoing in causing the unavailability of McLaughlin. Ochoa testified in his own defense that, among other things, McLaughlin, (the former tenant) used his knowledge of the residence to break in and make the telephone calls.

178. Id. at 256-57.
179. 229 F.3d 631 (7th Cir. 2000).
180. Id. at 634.
181. Id.
182. Id. at 634-35.
183. Id.
184. Id.
185. Id.
186. Id.
187. Id.
188. Id.
189. Id.
190. Id. at 636.
On appeal, Ochoa argued that the evidence was insufficient to prove wrongdoing on his part. The Seventh Circuit found that the doctrine that a defendant may waive his or her constitutional right to confront witnesses by misconduct had been codified in Rule 804(b)(6), and that the showing of procured unavailability must be made by the government by a preponderance of the evidence. The court held that the evidence produced against Ochoa was insufficient to prove wrongdoing. The only evidence that the government produced were the seven telephone calls from Ochoa’s residence allegedly made by McLaughlin to his former employer. The court also found that Rule 804(b)(6) requires the conduct at issue to be wrongful, and that permitting a witness at one’s upcoming trial to use a phone, without more, was not a culpable act. The government produced no evidence that Ochoa knowingly aided McLaughlin in becoming unavailable. If the prosecution failed to proved that Ochoa knew that he was helping McLaughlin to procure his unavailability, then Ochoa’s conduct could not have been wrongful as required by the rule.

The court, nevertheless, upheld Ochoa’s conviction. Although the court found that admission of McLaughlin’s hearsay statements was erroneous and violated Ochoa’s rights under the Confrontation Clause, it was held to be harmless error. The government had provided a substantial amount of evidence demonstrating Ochoa’s guilt in addition to the hearsay statements.

In United States v. Peoples, the Eighth Circuit considered a case in which Cornelius Peoples and his co-defendant Xavier Lightfoot were convicted of aiding and abetting the murder of a federal government witness. The government’s theory at trial was that Peoples and Lightfoot had entered into a contract to pay unknown persons to kill Jovan Ross, because Ross was providing law enforcement parties information about Lightfoot’s criminal activity. The government also argued that although Ross had no substantial information implicating Peoples in criminal activity, Peoples believed his involvement would soon be discovered, if Ross continued to cooperate with law enforcement.

191. Id. at 639.
192. Id.
193. Id.
194. Id.
195. Id.
196. Id. at 640.
197. Id. at 641.
198. 250 F.3d 630 (8th Cir. 2001).
199. Id. at 634.
200. Id.
201. Id.
The defendants contended on appeal that the trial court erred by denying their motion for a mistrial based on an improper statement made by the prosecutor. During the trial, a government witness had testified about a statement that Ross had made to him. After defense counsel made a hearsay objection, the prosecutor asserted that the defendant had "murdered the witness" (referring to Ross). The prosecutor argued that the statements were, therefore, admissible under Rule 804(b)(6). The trial court judge overruled the hearsay exception. The judge then "instructed the jury that the statement had been admitted conditionally and that its ruling did not mean that the court believed that the defendants had caused Ross to be murdered."

The Eighth Circuit held that "the prosecutor's remark was not improper, because it merely reiterated the government's theory of the case and provided for the admissibility of the proffered statement." The court concluded, further, that even if the remark was improper, they were satisfied that the trial court's instruction was sufficient to cure any potentially unfair prejudice.

The Eighth Circuit had considered Rule 804(b)(6) earlier in United States v. Emery. In Emery, a jury convicted the defendant of killing a federal informant. The victim was Christine Elkins, who had been cooperating with federal officials in an investigation of Emery's drug trafficking activities. Emery appealed his sentence of life imprisonment without parole. Among the errors he asserted was that the admission of several hearsay statements made by Ms. Elkins violated Rules 403 and 802, as well as his Sixth Amendment right to confront witnesses testifying against him.

The appeals court disagreed with his assertions by citing Illinois v. Allen as authority for the well-established principle that "a defendant's misconduct may work a forfeiture of his or her constitutional right of confrontation . . . and that the right of confrontation is forfeited with respect to any witness or potential witness whose absence a decedent wrongfully procures." The court further held that such "hearsay objections are similarly forfeited under Rule 804(b)(6), which excludes from the prohibition on hearsay any 'statement offered against a party that has engaged or acquiesced in wrongdoing that

202. Id. at 635.
203. Id.
204. Id.
205. Id.
206. Id.
207. 186 F.3d 921 (8th Cir. 1999).
208. Id. at 924.
209. Id. at 926.
211. Emery, 186 F.3d at 926 (citation omitted).
was intended to, and did, procure the unavailability of the declarant as a witness."\textsuperscript{212}

The Emery court further noted that it was not necessary for the trial court to have held a preliminary hearing outside of the jury's presence, at which the prosecution would have had to prove by clear and convincing evidence that Emery had procured Elkins' unavailability, as Emery had argued.\textsuperscript{213} The appeals court noted that the trial judge had "admitted the hearsay evidence at trial in the presence of the jury, contingent upon proof of the underlying murder by a preponderance of the evidence."\textsuperscript{214} In doing so, the trial court followed cases dealing with the hearsay statements of co-conspirators. "In those cases, evidence is admitted conditionally, subject to proof by a preponderance of the evidence that the defendant and the declarant were co-conspirators."\textsuperscript{215} The Eighth Circuit reasoned that this procedure was appropriate.

With respect to Emery's Rule 403 argument, the court held that the hearsay evidence from Elkins "possessed significant probative value, particularly with respect to establishing Mr. Emery's motive."\textsuperscript{216} The court found that such "probative value was not substantially outweighed by the threat of unfair prejudice or confusion."\textsuperscript{217} The appeals court, therefore, affirmed Emery's conviction.\textsuperscript{218}

Finally, in \textit{United States v. Cherry},\textsuperscript{219} the Tenth Circuit addressed an interlocutory appeal on behalf of the government after the trial court granted a motion to suppress out-of-court statements made by a murdered witness. The appeals court was confronted with determining how the doctrine of waiver by misconduct and Rule 804(b)(6) applied to certain defendants. Such defendants were those "who did not themselves directly procure the unavailability of a witness, but allegedly participated in a conspiracy, where one of the members of the conspiracy murdered the witness."\textsuperscript{220}

In \textit{Cherry} the government had charged five defendants with involvement in a drug conspiracy. They were Joshua Price, Michelle Cherry, La Donna Gibbs, Teresa Price, and Sonya Parker.\textsuperscript{221} Much of the evidence in their case came from a cooperating witness, Ebon Sekou Lurks. Prior to trial, Lurks was murdered.\textsuperscript{222} The government

\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{214} Id.
\textsuperscript{215} Id.
\textsuperscript{216} Id. at 927.
\textsuperscript{217} Id.
\textsuperscript{218} Id. at 928.
\textsuperscript{219} 217 F.3d 811 (10th Cir. 2000).
\textsuperscript{220} Id. at 813.
\textsuperscript{221} Id.
\textsuperscript{222} Id. at 814.
moved to admit out of court statements by Lurks, pursuant to Rule 804(b)(6), on the grounds that the defendants wrongfully procured Lurk's unavailability.223

The relevant facts of the case revealed that Joshua Price obtained information that Lurks was cooperating with government officials investigating the drug ring. The facts further revealed that at about 11 p.m. on January 28, 1998, Joshua Price shot and killed Lurks.224 The trial court held that Joshua Price had "procured the absence of Lurks and hence Lurks' statements were admissible against him."225 The trial court also held, "however, that there was insufficient evidence that Teresa Price procured Lurks's absence and 'absolutely no evidence that Cherry, Gibbs, and Parker had actual knowledge of, agreed to or participated in the murder of . . . Lurks.'"226 The trial court refused to find that the other four defendants had waived their Confrontation Clause and hearsay objections to Lurks's statement.

The Tenth Circuit Court of Appeals disagreed with the trial court's rulings. The Tenth Circuit concluded that in appropriate circumstances co-conspirators can be deemed to have waived confrontation and hearsay objections.227 In this instance the court remanded, holding that waiver may have been present as a result of the co-conspirators' actions in furtherance of the conspiracy, within the scope of it, and reasonably foreseeable as a necessary or natural consequence of the ongoing conspiracy.228 The Court of Appeals found that the words of Rule 804(b)(6), "engaged or acquiesced in wrongdoing," supported the notion that waiver of confrontation rights could be imputed "under an agency theory of responsibility to a defendant who 'acquiesced' in the wrongful procurement of a witness's unavailability," even if the defendant "did not actually 'engage' in wrongdoing apart from the conspiracy itself."229 The court specifically held that "a co-conspirator may be deemed to have 'acquiesced in' the wrongful procurement of a witness's unavailability for purposes of Rule 804(b)(6) and the waiver by misconduct doctrine when the government can satisfy the require-

223. Id.
224. Id. at 814.
225. Id.
226. Id.
227. Id. at 813.
228. Id.
229. Id. at 816.
ments of Pinkerton."\textsuperscript{230} The Tenth Circuit then remanded the case to the trial court for findings under this enunciated standard.\textsuperscript{231}

VI. EVALUATION OF THE CASES SINCE THE 1997 AMENDMENT

The six court of appeals decisions cited in the foregoing section should be evaluated in light of several factors. Those factors include: 1) did the opinion and analysis cite the underlying policy reason for the forfeiture of wrongdoing rule; 2) were the historical forfeiture cases used as additional authority for the admission of the statements; 3) did the court believe that it was necessary to hold an evidentiary hearing in order to determine whether defendant procured the unavailability of the witness; and 4) was there a need for a rule 403 balancing test of probative value versus prejudicial effect. The Second, Fourth, Eighth, and Tenth Circuit Courts of Appeals all appear to have undertaken a thorough review of the facts in each of these cases and applied all or some of these factors in reaching their well-reasoned decisions.

The defendant in Dhinsa\textsuperscript{232} was certainly a violent criminal and there was substantial evidence to support his conviction. Nevertheless, the Second Circuit Court of Appeals did a thorough analysis of the facts and the underlying policy reasons for finding that the hearsay objections to the murdered witnesses’ statements were forfeited under Rule 804(b)(6) by the defendant. The court also cited the historical cases of Diaz\textsuperscript{233} and Mastrangelo\textsuperscript{234} as further support of the doctrine of forfeiture by wrongdoing.\textsuperscript{235} The Second Circuit also suggested that a trial judge undertake for the record a Rule 403 analysis to avoid admission of facially unreliable hearsay, even in light of the defendant’s wrongdoing. A concern that arises from the decision is derived from the Second Circuit’s pronouncement that the trial court must hold an evidentiary hearing outside of the presence of the jury.

\textsuperscript{230} Id. at 820. See also Pinkerton v. United States, 328 U.S. 640, 647 (1946). The Pinkerton doctrine holds that evidence of direct participation in a substantive offense is not necessary for criminal liability under the principles holding conspirators liable for the substantive crimes of a conspiracy. The Court specifically held,

\textit{the overt act of one partner in crime is attributable to all . . . If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense.}

\textit{Id.}

\textsuperscript{231} Cherry, 217 F.3d at 813.

\textsuperscript{232} 243 F.3d 635 (2d Cir. 2001).

\textsuperscript{233} 233 U.S. 442 (1912).

\textsuperscript{234} 693 F.2d 269 (2d Cir. 1982).

\textsuperscript{235} Dhinsa, 243 F.3d at 652.
prior to finding that the defendant was responsible for procuring the unavailability of the witness. Rule 804(b)(6) does not require such a hearing. Requiring a hearing in such cases may well cause a conflict in the circuits.

The Fourth Circuit's ruling in Johnson\textsuperscript{236} was not as long or as thorough as that of the Second Circuit in Dhinsa but it did cite the policy reasons for the forfeiture rule in its decision. In Johnson, the court found that there had been no abuse of the trial court's discretion in admitting the statements of the murdered witness over Raheem's hearsay objection.\textsuperscript{237} What is most noteworthy in Johnson is that the Fourth Circuit specifically held that it was not necessary to hold an evidentiary hearing outside of the jury's presence to determine whether the defendant procured the unavailability of the witness. Instead, the appellate court held that the trial court could admit the statements contingent upon proof of the underlying murder by a preponderance of the evidence.\textsuperscript{238} This appears to be the correct way Rule 804(b)(6) is to be interpreted.

Only in Ochoa\textsuperscript{239} did a court, the Seventh Circuit Court of Appeals, determine that admission of hearsay statements pursuant to 804(b)(6) was improper. Admission of the hearsay statements—seven phone calls made by the missing witness from the defendant's house within two weeks before the trial—were not adequate evidence of conduct demonstrating wrongdoing.\textsuperscript{240} Although the court cited the policy reason for the forfeiture rule, the court found that the government produced no evidence of Ochoa's wrongdoing in keeping the witness away. Ochoa presents a factual case where an evidentiary hearing on procurement of the unavailability of the witness by the defendant might be prudent to avoid facially unreliable hearsay, even though not required by the Rule.

The Eighth Circuit Court of Appeals upheld the waiver by forfeiture rule of 804(b)(6) in both Peoples\textsuperscript{241} and Emery\textsuperscript{242} and cited the policy reasons for the Rule. In Emery, the court also relied upon the historical case of Illinois v. Allen\textsuperscript{243} for support of the well-established principle that one's wrongdoing would work a forfeiture of confrontation rights for hearsay purposes. It is also worthy to note that the Emery court also ruled that it was not necessary to hold an evidentiary hearing outside of the presence of the jury to determine the admissibility of the statements.

\textsuperscript{236} 219 F.3d 349 (4th Cir. 2000).
\textsuperscript{237} Id. at 355.
\textsuperscript{238} Id. at 356.
\textsuperscript{239} 229 F.3d 631 (7th Cir. 2000).
\textsuperscript{240} Id. at 639.
\textsuperscript{241} 250 F.3d 630 (8th Cir. 2001).
\textsuperscript{242} 186 F.3d 921 (8th Cir. 1999).
The Tenth Circuit Court of Appeals decision in Cherry\textsuperscript{244} is noteworthy as well. The court not only cited the policy reasons for the forfeiture rule, but clarified how it might be used in co-conspirator cases. The court concluded pursuant to the Pinkerton\textsuperscript{245} theory of liability that co-conspirators, who themselves may not have personally procured the unavailability of the witness, could be deemed to have waived their right to confrontation.

Rule 804(b)(6) may be used in both civil and criminal trials. The rule may be utilized by any party who has evidence that a party opponent has procured the unavailability of a witness by wrongdoing. It appears from this evaluation of the foregoing use of the rule in the criminal cases that one seeking to invoke Rule 804(b)(6) against a party opponent to permit the admission of hearsay procured by wrongdoing should be prepared to address the evaluative factors set out above. One should certainly 1) be able to articulate the policy reasons underlying the rule; 2) be aware of the historical cases on forfeiture which underpin the rule and be able to argue them; 3) be prepared to argue against the need for an evidentiary hearing outside of the presence of the jury with respect to introduction of the statements, and 4) be prepared to argue, pursuant to Rule 403, that the probative value of the statements are not outweighed by their prejudicial nature given the wrongdoing of the party opponent. A party should not profit from his own wrongdoing.

VII. CONCLUSION

Analysis and evaluation of the forfeiture by wrongdoing cases decided since the addition of its codification into Rule 804(b)(6) reveals that these modern era cases document a shocking degree and level of violence and intimidation against witnesses in federal trials. This Article demonstrates that federal prosecutors and judges are quite familiar with the new rule on forfeiture and utilize it unsparingly in an effort to insure that relevant testimony is admitted despite the fact that the declarants have been intentionally silenced.

Having reviewed the history of the concept of forfeiture by wrongdoing, explored the legislative history of the new Rule, and assessed the cases utilizing the new rule, one question still exists: was the codification of forfeiture by wrongdoing into Rule 804(b)(6) necessary? Stated another way, would there have been any difference in the outcome of the post 1997 cases using the case law of Reynolds, Diaz and Mastrangelo rather than the new rule? The answer is, of course not. So, why the codification?

\begin{table}[h]
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244. & 217 F.3d 811 (8th Cir. 2000). \\
245. & See supra text accompanying note 228. \\
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The answer is that in this modern era, codification of such a hearsay rule is a reliable and effective means of insuring that there will be a prophylactic rule to deal with abhorrent "behavior which strikes at the heart of the system of justice itself."\textsuperscript{246} In essence, with respect to our modern day evidence code, it is probably best to put old wine into new bottles.

\textsuperscript{246} United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982).