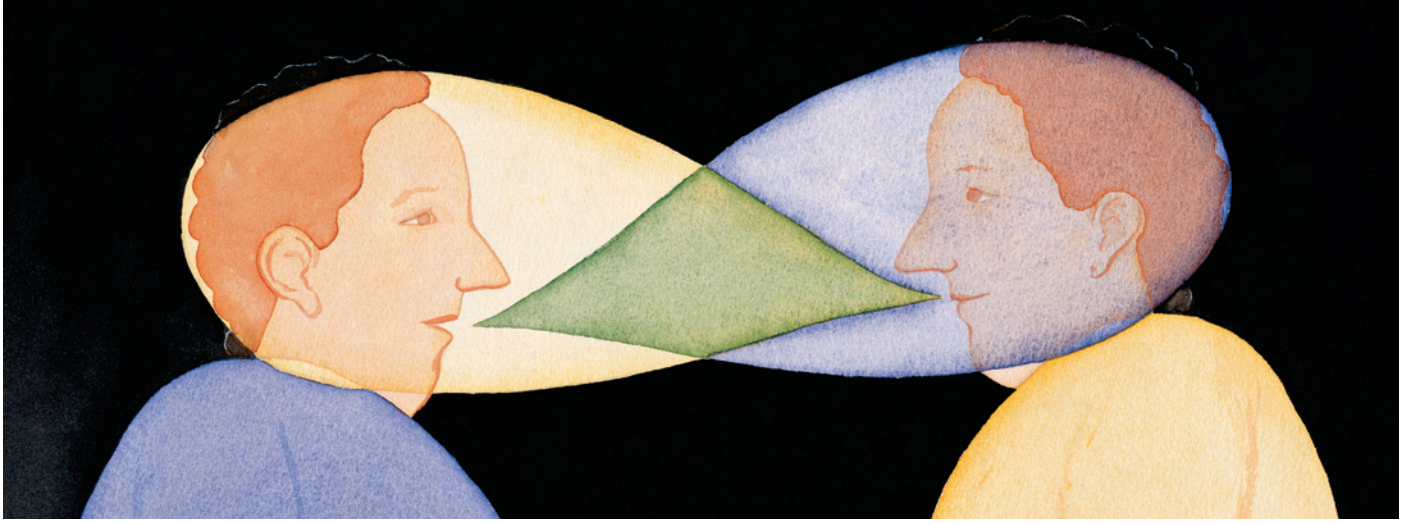
Do Two Wrongs Forfeit A Constitutional Right? Revising the Hearsay Rule to Protect the Right to Confrontation

By Jodi Lynn Foss



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.
—Supreme Court of the United States, *Crawford v. Washington*

It is the definition of "unconstitutional" personified: The extinguishment of a constitutionally protected confrontation right by a statutorily created hearsay exception. Yet, in our U.S. courts, a federal rule dealing with hearsay evidence—Rule 804(b)(6)—has such unbelievable power. Federal Rule 804(b)(6) is a hearsay rule that was created by statute and is being used to extinguish an accused person's constitutional right to confront his or her witness. The Sixth Amendment guarantees that right in all criminal prosecutions: "the accused shall enjoy the right … to be confronted with the witnesses against him. …" U.S. CONST. Amend. VI. Federal Rule 804(b)(6) provides the following: "Forfeiture by wrongdoing. A statement offered against a party that has acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

In America, the exaltation of a hearsay rule above a constitutional right is not only nonsensical, it is by definition unconstitutional! After all, America is the first nation to proclaim that its written constitution is the supreme law of the land. It is, therefore, all the more disturbing that the U.S. federal courts and state courts that rely on the federal system for guidance,[1] are allowing the forfeiture by wrongdoing hearsay exception to extinguish the constitutional right to confrontation.

However, the ability of the accused to forfeit a constitutionally granted right is not per se unconstitutional. The common law forfeiture by wrongdoing doctrine is a valid tool that can be used to extinguish the constitutional right to confrontation. *Crawford v. Washington*, 541 U.S. 36, 62 (2004); *Reynolds v. United States*, 98 U.S. 145, 158–159 (1878). Instead, the error is that that a mere evidentiary hearsay rule that has no reverence for individual rights is allowed to extinguish a constitutional right. The U.S. Supreme Court has expressly acknowledged that hearsay analysis does not implicate constitutional concerns. *Crawford*, 541 U.S. at 61. How did it become acceptable then—and even common—for courts to rely on Rule 804(b)(6) to extinguish the right to confrontation? The answer is simply that courts and counsel are confused—and understandably so—by the relationship between the common law forfeiture doctrine, forfeiture by wrongdoing hearsay exception of the Federal Rule of Evidence 804(b)(6), and the Confrontation Clause.

The complicated and seldom explained relationship between the two forfeiture doctrines and the Confrontation Clause is best illustrated by way of a hypothetical example. During a federal criminal trial the prosecution offers the testimony of witness W, who is unavailable to appear in court because of the accused's "wrongdoing." The accused promptly makes a two-pronged objection to W's testimony: one based on hearsay grounds and the other on the constitutional grounds that it violates his right to face his accuser. What sources will the judge rely on to make a ruling in response to the defendant's objections?

Rule 804(b)(6) clearly can guide the judge in making a ruling on the admissibility of hearsay evidence. The judge's

ruling only becomes complicated when considering the confrontation objection. The Sixth Amendment is the primary source the judge will rely on when considering the confrontation objection. However, even though it acknowledges the right to confrontation, the Sixth Amendment offers the judge no guidance about *how* to determine if that right has been violated. Finding the Sixth Amendment unsatisfactory for this determination, the judge, in this case, must turn to the common law doctrine of forfeiture.

Because Rule 804(b)(6) is based on the common law doctrine of forfeiture, it could be a legitimate tool to measure the forfeiture of the confrontation right. But Rule 804(b)(6) must be amended before its application to a constitutional right is constitutionally valid. The common law forfeiture by wrongdoing doctrine is a widely accepted doctrine, deep-rooted in the belief that no one may benefit from his or her own wrong or complain of a self-imposed situation. The common law doctrine validly overcomes the accused's Sixth Amendment right to confront accusers. *Crawford v. Washington*, 541 U.S. at 62. The common law forfeiture doctrine undeniably has the power to eliminate the right to confrontation, but Supreme Court jurisprudence has led courts away from the application of the common law forfeiture doctrine by collapsing the common law doctrine into hearsay exceptions. The result is that, in cases in which the common law forfeiture by wrongdoing doctrine should be and could be constitutionally applied, forfeiture by wrongdoing hearsay Rule 804(b)(6) is being wrongfully applied to constitutional confrontation objections.

The Constitution Dethroned then Enthroned: *Roberts*, *Crawford*, and *Davis*

The Supreme Court declared constitutional rights analysis equal to hearsay analysis as early as 1980 in *Ohio v. Roberts*, 448 U.S. 56 (1980). But with the landmark decision of *Crawford v. Washington*, the Supreme Court returned the Constitution to its proper, sovereign position above hearsay laws. In 2006, the Supreme Court reiterated its allegiance to constitutional supremacy in *Davis v. Washington*, 126 S. Ct. 2266 (2006).

In *Roberts*, the Court essentially concluded that, if an out-of court statement by an unavailable witness cleared the hearsay hurdles, the Confrontation Clause posed no additional barrier. Seventeen years after the *Roberts* decision, the hearsay exception Rule 804(b)(6)—the codification of the common law forfeiture by wrongdoing doctrine—was added to the Federal Rules of Evidence. David F. Binder, HEARSAY HANDBOOK, § 42 (4th ed. 2001). The Supreme Court's ruling in *Roberts* that Confrontation Clause hurdles were only as high as hearsay hurdles, paired with the adoption of Rule 804(b)(6), resulted in courts' view of that rule as the only obstacle that needed to be overcome for a defendant to forfeit his or her constitutional right to confrontation. The Supreme Court "has shown a tendency to construe [the Confrontation Clause] nearly in conformity with the hearsay sections of the Federal Rules of Evidence." Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 509 (1997). Specifically, between 1980 and 2004, the time that *Roberts* was law, courts looked to hearsay law to determine if there was a forfeiture of the accused's right to confrontation. Because Rule 804(b)(6) was codified in 1997, from 1997 to 2004, courts looked to Rule 804(b)(6) to determine the same issue.

Such was the world for seven years, until the Supreme Court re-established the Confrontation Clause to its proper place of authority above hearsay in *Crawford v. Washington*. The Supreme Court rejected *Roberts*' characterization that hearsay and constitutional hurdles are the same height. The *Crawford* Court further emphasized the common law forfeiture by wrongdoing doctrine. Approvingly citing *Reynolds*, the decision in *Crawford v. Washington* acknowledged that "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation on essentially equitable grounds. …" but declared that the common law doctrine is not on the level of evidentiary matters, as "it does not purport to be an alternative means of determining reliability." *Crawford,* 541 U.S. at 62.

Under *Crawford*, applying forfeiture hearsay exception Rule 804(b)(6) to a Confrontation Clause issue would be unconstitutional. Nevertheless, application of the common law forfeiture doctrine has always been—and continues to be—a constitutionally proper practice. Two years later, the *Davis* Court reaffirmed the ruling in *Crawford* that forfeiture was an equitable doctrine and added that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." *Davis v. Washington*, 126 S. Ct. at 2280.

Even though the reverence of constitutional rights has been revived by *Crawford* and *Davis*, courts continue their nasty habits of looking to hearsay exception Rule 804(b)(6) when ruling on a confrontation objection. Consequently, the current application of Rule 804(b)(6) to confrontation objections is, as it has been since its codification, in direct violation of the Constitution, but the application is now also in direct violation of Supreme Court jurisprudence as declared in *Crawford* and *Davis*.

Codification of the Common Law: Federal Rule 804(b)(6)

In 1878, the Supreme Court first applied the forfeiture by wrongdoing exception in *Reynolds v. United States,* 98 U.S. at 158. The *Reynolds* Court declared: "The Constitution does not guarantee an accused person against the legitimate consequences of his 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 his privilege." *Id.* at 158. In 1982, *United States v. Mastrangleo* was the first case in which a court recognized acquiescence as a tool that can extinguish the right to confrontation. *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982). The *Mastrangelo* court was led by Judge Winter, who became the chairman of the Advisory Committee on Federal Rules of Evidence in late 1994. Leonard Birdsong, *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), 80 NEB. L. REV. 891, 905 (2001) (citations omitted).

Rule 804(b)(6) codified the forfeiture by wrongdoing doctrine and incorporated the acquiesce rationale used by

the *Mastrangelo* court. Designed as a hearsay exception, Rule 804(b)(6) was made for the purpose of fairness and efficiency and was not designed with the procedural safeguards the Founders desired for the protection of individual rights. FED. R. EVID. 102. ("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").

Hearsay Exception, Rule 804(b)(6): Forfeiture by Wrongdoing

Between the Supreme Court decisions of *Roberts* and *Crawford*, Rule 804(b)(6) was codified in the Federal Rules of Evidence. The rule declares that a statement by an unavailable witness is excluded as hearsay when the statement is "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."

Rule 804(b)(6) is plagued with ambiguity that results in widespread and unpredictable application of the rule. The willingness of courts to apply this lowly hearsay exception to Confrontation Clause questions is still widespread. But the hope is that the application of the rule to issues involving the right to confrontation will diminish as more courts come to understand that *Crawford* and *Davis* require what the Constitution has required all along: that a constitutional right must be protected and therefore supersedes any evidentiary analysis. However, even after the courts break themselves of the bad habit of applying the rule to constitutional cases, Rule 804(b)(6) will continue to serve as persuasive precedent for courts faced with a confrontation objection.[2] Moreover, while the application of the common law may not differ in result from the application of Rule 804(b)(6), an application of the common law will be constitutional. The ability that Rule 804(b)(6) has to extinguish a constitutional right when unconstitutionally applied and when used as persuasive precedent makes the ambiguity of Rule 804(b)(6) dangerous and unacceptable.

The wording of Rule 804(b)(6) has the most dangerous ambiguities. Specifically, the words "acquiescence" and "wrongdoing" cause the most confusion in their application. It is interesting to note that the ambiguity of the words "acquiesce" and "wrongdoing" is not a result of carelessness by the drafters of the rule; the ambiguity is there on purpose.[3] The Advisory deliberately chose vague wording so that courts would apply a "common sense" interpretation of Rule 804(b)(6). *Id*. at *26. The second danger of Rule 804(b)(6) is that it offers no insight as to how the procedural hearing of a finding of forfeiture should be conducted.

"Acquiescence" Ambiguity[4]

The word "acquiescence" as used in Rule 804(b)(6) gives rise to two main ambiguities. First, the term "acquiescence" is not defined; therefore it leads to confusion and unpredictable application. Second, the combination of a "forfeiture" title and text that includes "acquiesce" is inconsistent with the meaning of both terms because, even though these terms are unfortunately used interchangeably, both terms have distinct meanings.[5]

Application of the rule is unpredictable

The first court-recognized extinguishment of a Confrontation Clause right by acquiescence was done by the *Mastrangelo* court led by Judge Winter. The *Mastrangelo* court decided that "[b]are knowledge of a plot to kill [declarant] and a failure to give warning to appropriate authorities is sufficient to constitute a waiver." *Mastrangelo*, 693 F.2d at 273–274. But, in the years since *Mastrangelo*, courts have declined the lenient application of acquiesce, holding instead that "[m]ere failure to prevent the murder … must surely be insufficient to constitute a waiver of a defendant's constitutional confrontation rights." *United States v. Houlihan*, 887 F. Supp. 352, 364–365 (D.Mass. 1995), *aff'd in part, rev'd in part*, F.3d 1271 (1st Cir. 1996); see also *United States v. White*, 838 F. Supp. 618, 623 (D.D.C. 1993).

The codification of the common law forfeiture doctrine in Rule 804(b)(6) was on open invitation to clear up the "acquiescence" ambiguity. Unfortunately, the invitation was declined. Currently, courts are divided over whether the simple fact that the accused benefits from a wrongdoing is enough to raise a presumption that the accused acquiesced to the wrongdoing. Richard Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. no. 2, 4 (2004). The drafters of Rule 804(b)(6) did not address this question but did declare that the word "acquiescence" was chosen because it does not "require a showing that defendant *actively* participated in procuring the declarant's unavailability."[6] Still, at least one court has required that a defendant engage in an intentional criminal act before a forfeiture can arise. *People v. Giles*, 19 Cal. Rptr. 3d 843 (Ct.App. 2004), *review granted*, 102 P.3d 930 (Cal. 2004). Unfortunately, the confusion surrounding the appropriate application of Rule 804(b)(6) in claims of forfeiture would not be eliminated by a determination of what constitutes "acquiescence," because the rule has the title of a forfeiture rule but is made up of language that is appropriate for a waiver rule.

"Acquiescence" is inconsistent with the definition of "forfeiture"

In both definition and rationale, a forfeiture doctrine is applied only upon a showing of an affirmative act; an act of omission will not suffice. Yet Rule 804(b)(6), which has the title of forfeiture, can be triggered by the mere showing of a defendant's acquiescence—a mere act of omission.

Rule 804(b)(6) is designated as a forfeiture rule, but the rule is being applied to instances that involve a waiver. Even though they are often used interchangeably, the words "forfeiture" and "waiver" have distinct meanings. Forfeiture is a punishment given as a result of wrongdoing and is unlike waiver, which "occurs though other forms of defendant conduct."[7] It is this important difference between the terms that led the drafters to change the title of Rule 804(b)(6) from "Waiver of Misconduct" to "Forfeiture by Wrongdoing."[8]

The original drafting of the Rule 804(b)(6) considered a waiver scenario and declared that a defendant could waive

his or her constitutional right by acquiescence. The title change was inspired by the logic that "[t]he situation described by the rule does not give rise to a waiver, because the wrongdoer is not *voluntarily* relinquishing a known right. It gives rise to forfeiture." Binder, HEARSAY HANDBOOK § 42:2 (emphasis added). The title of Rule 804(b)(6) was correctly changed because of the inconsistencies caused by the original title. The rationale for the change should have resulted in deleting the word "acquiescence" from the rule, but it did not; the text of the rule remained unchanged. As a result, Rule 804(b)(6) can be used to find that a defendant has forfeited the right—a punishment that is reserved for only affirmative acts—in situations where the defendant has merely acquiesced.

Definitions of the word "forfeiture" may vary slightly, but they all share the requirement of an affirmative act. Forfeiture occurs "when an individual *commits an act* inconsistent with maintaining a right." Joshua Deahl, *Expanding Forfeiture Without Sacrificing Confrontation After* Crawford, MICH. L. REV. 599, 600 (2005) (emphasis added) (citations omitted). Even a lenient definition of forfeiture requires an affirmative act: recognizing forfeiture as a "penalty against a party who *engages in conduct* of which a court disapproves."[9]

Like the definition of "forfeiture," rationales for the forfeiture rule emphasize an active wrong on the part of the defendant. The common law forfeiture by wrongdoing doctrine is based on the maxims that that no one shall be permitted to take advantage of his or her own wrongdoing and, similarly, that one cannot complain about a situation that one affirmatively created.[10] The latter rationale is echoed by the founding belief evident in Rule 804(b)(6): that "[a] defendant cannot prefer the law's preference and profit from it … while repudiating that preference by creating the condition that prevents is." Another rationale for the doctrine that is specific to Rule 804(b)(6) is that it deters litigants from acting against the witness. Rule 804(b)(6) is "based on a public policy protecting the integrity of the adversary process by deterring litigants from *acting* on strong incentives to prevent testimony of an adverse witness." Binder, HEARSAY HANDBOOK § 42:3 (emphasis added).

All the rationales for the forfeiture doctrine, both common law and Rule 804(b)(6), are in accordance with the Sixth Amendment, which "does not guarantee an accused person against the legitimate consequences of his own wrongful acts." *Reynolds*, 98 U.S. at 158. Yet, despite the forfeiture rationales, the term "acquiescence" was chosen because it did not require that a defendant *actively* participate in procuring the declarant's unavailability.[11] Because it is contradictory for any forfeiture rule to imply, by word or by deed, that it can be triggered by anything other than an affirmative act, as used in Rule 804(b)(6), the term "acquiescence" is misplaced and confusing.

"Wrongdoing" Ambiguity

Like the word "acquiesce," the word "wrongdoing" was strategically chosen for its vagueness so that courts would have discretion when applying Rule 804(b)(6) to individual cases. Leonard Birdsong, *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)*, 80 NEB. L. REV. 891, 907 (2001) (citations omitted). However, the ambiguity of the word "wrongdoing" has also resulted in divided courts and unpredictable applications. Even though the Advisory Committee on the Federal Rules of Evidence has noted that Rule 804(b)(6) "applies to actions taken *after* the event to prevent a witness from testifying,"[12] courts and counsel alike remain confused about both the numerical and the temporal requirements for a finding of a wrongdoing.

First, the numerical requirement focuses on reflexivity[13] and asks: Does the application of Rule 804(b)(6) require two separate wrongs? Second, if separate wrongs are required, the question raised by the temporal requirement is: Does the sequence of those wrongs affect the application of the forfeiture doctrine? The importance of both questions will be discussed below, but Rule 804(b)(6) leaves both unanswered.

Numerical ambiguity: Does Rule 804(b)(6) require two separate wrongs?

The common law forfeiture doctrine does not definitively establish how many wrongs are required for a finding of forfeiture.[14] Codification of the common law forfeiture doctrine into the hearsay exception in Rule 804(b)(6) offered an opportunity to clearly establish how many wrongs are required for an application of the common law doctrine.[15] However, the opportunity for clarification was again missed and no illumination is found in Rule 804(b)(6).

Cases are plagued with the uncertainty of whether one wrong can serve as the reason for both the trial and the forfeiture application. It is still argued in courts today whether two separate wrongs are needed or whether the doctrine can apply reflexively. Rule 804(b)(6) and current jurisprudence offers no guidance on the subject. Unlike some of the ambiguities of Rule 804(b)(6), courts have offered no guidance on the numerical ambiguity found in the rule. Therefore, even more than with the other ambiguities, Maryland Rule 10-901 is a great help when it comes to interpreting and applying the federal rule.

Temporal ambiguity: Does the sequence of wrongs affect the application of the forfeiture doctrine?

Even though some courts do not accept the reflexive approach, all courts do accept that two separate wrongs will satisfy the forfeiture requirements. However, even when there are two wrongs, debates arise as to whether the sequence of the wrongs matters. Rule 804(b)(6) does not indicate whether the wrong that triggers the statute must occur *after* the wrong for which the defendant is currently on trial or if a wrong occurring *before* the reason for the trial can also trigger the statute. What seems to be a trivial clarification quickly becomes essential in cases that involve organized crime or domestic violence.

Consider the following hypothetical cases.[16] The first example is that of a woman who is being abused by her boyfriend and is subsequently needed as a witness in his drug trial. Can Rule 804(b)(6) be applied to her if she is

afraid to testify because of his previous violence, even if the violence is unrelated to the present drug charge against him? Another example is that of an aspiring mob boss who severely beats up victims A, B, and C with the intention of gaining a reputation on the street. Suppose that after beating up A, B, and C, the mob boss tells the three victims to "spread that word that nobody messes with me." Later, witness W is called to testify against the mob boss in a drug trial. If W refuses to testify out of fear of the mob boss, has the mob boss forfeited his right to confront W because of his wrongful act of beating up A, B, and C with the intent of guaranteeing that nobody would testify against him? Rule 804(b)(6) raises questions along these lines but again leaves it to the courts to come up with their own answers.

Intent to Silence: Requirement and Standard

Rule 804(b)(6) requires that the wrongdoing committed by the accused be "intended to, and did, procure the unavailability of the declarant as a witness." It is well established and clearly understood that an accused's "wrongdoing" must have been committed with the intent to silence a witness before Rule 804(b)(6) can be triggered. But, the clarity of the rule quickly deteriorates when it is applied outside of a hearsay context—its only appropriate context—and to an objection based on the Confrontation Clause.

Is intent to silence required?

Courts look to Rule 804(b)(6) as a guide to objections based on the Confrontation Clause and therefore the intent to silence requirement for the forfeiture doctrine as it applies to the Confrontation Clause must be established before courts become even more confused and violate even more of a defendant's constitutional rights. In *United States v. Garcia-Meza*, 403 F.3d 364 (6th Cir. 2005), the Sixth Circuit Court of Appeals recognized that an application of Rule 804(b)(6) is different when it is used for hearsay objections than when it is used for confrontation objections. At the time this article was written, *Garcia-Meza* is the only federal appeals court to consider the role of intent in a preliminary hearing. The *Garcia-Meza* court required that the intent be to silence a witness for hearsay objections but required no such showing for a confrontation objection. The court succinctly declared that "[t]hough the Federal Rules of Evidence may contain [the intent to silence] requirement, the right secured by the Sixth Amendment does not."

Should it be based on a preponderance of the evidence or on clear and convincing evidence?

Rule 804(b)(6) does not provide a standard for the courts to apply when deciding if an accused has forfeited his or her right to confrontation. As a hearsay rule, Rule 804(b)(6) has inherited the preponderance of the evidence standard,[17] but with no standard specifically identified, the standard may change from court to court. The *Davis* court declared that the Supreme Court takes "no position on the standards necessary to demonstrate such forfeiture, but federal courts using Federal Rules of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance of the evidence standard." *Davis*, 126 S. Ct. at 2280 (citations omitted). The low standard is a reflection of the Advisory Committee's disdain for the wrongdoing that Rule 804(b)(6) addresses: wrongdoing that "strikes at the heart of justice." USCS FED. R. EVID. 804, Notes of Advisory Committee on 1997 Amendments; *see also Mastrangelo* 693 F.2d at 274.

The Advisory Committee reviewing Rule 804(b)(6) reasoned that, if a standard of proof higher than preponderance of the evidence were required, more parties would be disposing of witnesses. With only a preponderance standard, the wrongful behavior is punished by allowing otherwise inadmissible hearsay testimony in cases where the testimony might otherwise have been excluded. USCS FED. R. EVID. 804, Notes of the Advisory Committee on 1997 Amendments.

Although no standard governs Rule 804(b)(6), one thing is certain: When Rule 804(b)(6) is used to extinguish a confrontation claim, the standard for a forfeiture must be elevated above a preponderance standard—the lowest burden of proof in our courts—in order to reflect the appropriate reverence for the Constitution.

The State Stays Constitutional: Maryland Forfeiture Rule 10-901[18]

Of course, criminal defendants (the accused) have the right to confront the witnesses against them—whether their case is brought in federal or state court. In federal court, Rule 804(b)(6) is applied to the hypothetical case posed in the introduction to this article. If the same hypothetical is considered in state court, the analysis remains the same, with the consideration of Rule 804(b)(6) being substituted for its state counterpart. If the hypothetical accused was lucky (at least as lucky as an accused can be), the defendant would be in a Maryland state court and under the authority of Maryland Forfeiture Rule 10-901.

Fortunately, Maryland's forfeiture rule resolves the ambiguities that plague its federal counterpart. Maryland used Rule 804(b)(6) as a foundation for its forfeiture rule but constructed its own firmer—and stricter—framework. In 2005, Maryland codified the common law forfeiture doctrine for hearsay purposes in Maryland Rule 10-901, which adopts, by reference, Maryland Rule 5-804. *See* Tracy L. Perrick, *Crawford v. Washington: Redefining Sixth Amendment Jurisprudence: The Impact Across the United States and in Maryland*, 35 U. BALT. L. REV. 133, 134 (2005) (citations omitted).

The relevant parts of Maryland Rule 10-901 read as follows:

(a) … a statement as defined in Maryland Rule 5-801(a) is not excluded by the hearsay rule if the statement is offered against a party that has engaged in, directed, or conspired to commit wrongdoing that was intended to and did procure the unavailability of the declarant of the statement, as defined in Maryland Rule 5-804.
(b) Hearing—Subject to subsection (c) of this section, before admitting a statement under this section, the

court shall hold a hearing outside the presence of the jury at which:

(1) The Maryland Rules of Evidence are strictly applied; and

(2) The court finds by clear and convincing evidence that the party against whom the statement if offered engaged in, directed, or conspired to commit the wrongdoing that procured the unavailability of the declarant.

(c) … As soon as is practicable after the proponent of the statement learns that the declarant will be unavailable, the proponent notifies the adverse part of. …

MD. CODE ANN. (Cts. & Jud. Proc.) § 10-901 (LexisNexis 2006).

Acquiescence Is Not Enough for Forfeiture in Maryland

Under Maryland Rule 10-901, hearsay cannot become admissible by the defendant's acquiescence. Notably, Maryland's original forfeiture statute included acquiescence as a basis for forfeiture, but the statute was amended just one year later to exclude acquiescence. 2005 *Md. Chap.* 446.

Excluding the word "acquiescence" from its forfeiture statute, Maryland eliminated two ambiguities with one deletion: (1) the rule silenced debates about what constitutes acquiescence and (2) the rule avoided the inconsistencies that arise when a forfeiture doctrine is triggered by an act of omission. Maryland's eloquently simple solution to the confusion surrounding the word "acquiescence" has given Maryland a uniform and predictable forfeiture doctrine that also clearly reflects the purpose of the common law forfeiture doctrine. Notably, both of these inconsistencies that Maryland resolved afflict Federal Rule 804(b)(6).

Maryland 10-901 makes it impossible for an accused to lose his or her right to face the accusers by acquiescence and, instead, requires an affirmative action by the defendant in order to forfeit the right.[19] Moreover, Maryland Rule 10-901 uses the term "wrongdoing" in a way that reserves the judicial leeway desired by the drafters of Rule 804(b)(6).

Wrongdoing: Two Separate Wrongs Are Required and the Sequence Is Irrelevant

The key to unlocking the mysteries that accompany the word "wrongdoing" is found in the notice requirement of the Maryland forfeiture rule. Maryland Rule 10-901(c)(2) addresses the temporal and numerical characteristics of the wrongdoing by requiring that the party requesting forfeiture notify the adverse party "[a]s soon as is practicable after the proponent of the statement learns that the[20] declarant will be unavailable."

Maryland's statute declines to apply a reflexive approach, because it requires the proponent of the forfeiture claim to notify the adverse party as soon as possible after learning that the declarant will be unavailable. If the same wrongdoing were enough to take the defendant to trial and to apply the forfeiture, the party offering the statement would know about the unavailability of the witness at the exact moment of learning about the charge against the defendant.[21] Consequently, the Maryland forfeiture rule implies that a wrongdoing that is separate from the one that brought the defendant into court is the cause of the unavailability of the declarant.

According to the language in Maryland's statute, two separate wrongful acts are required in order to trigger the statue, but no specific temporal relationship between the wrongs is required. The language implies that the sequence of the wrongs is irrelevant; the only requirement is that two wrongful acts have been committed. With no temporal requirement for the wrongs, acts that will procure the unavailability of a witness can occur *before* or *after* the wrongdoing for which the accused is on trial if that act is done with the intent of preventing testimony. Even though Maryland Rule 10-901 applies when the wrongdoing was "intended to and did procure the unavailability of the declarant," the hearing section of the statute does not require a showing of intent to silence. Therefore, a proper application of the Maryland rule requires a showing of intent just as Federal Rule 804(b)(6) does, but the intent element is needed only to get to the hearing. Once the hearing is convened, the intent element is irrelevant.

How then does Maryland's rule affect the mob boss and the domestic violence victim in the hypothetical cases discussed above? In the mob boss example, the beating of victims A, B, and C would fit the definition of a "wrongdoing" that is required to trigger Maryland Rule 10-901. The beatings of A, B, and C were intended to procure the unavailability of future witness. Therefore, if witness W is afraid to testify against the mob boss because of past wrongful acts in which the mob boss participated for the purpose of causing the unavailability of future witnesses, such as W, the forfeiture rule is applied. In this case, the wrongs would be separate and the wrongdoing that triggered the mob boss's forfeiture would have occurred before the wrongdoing for which the mob boss is on trial. The issue of whether the claim of forfeiture is accepted is determined by the court during the preliminary hearing, during which a clear and convincing standard would be applied. However, Maryland would not have to show that the defendant intended to stop the testimony of the witness at the preliminary hearing.

The domestic violence example is even more interesting and is undoubtedly a situation that is more common. Under Maryland Rule 10-901, the past wrongdoing of the abuser that caused the current unavailability of the victim of domestic violence will extinguish a confrontation claim. It is critical that forfeiture rules be applied to domestic violence situations because, in the immediate aftermath of abuse, victims may cooperate with police. Still, as time passes, fear and other factors "begin to bear heavily on the victim in a matter of days." Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 771 (2005). It is therefore vital that domestic violence victims find refuge in forfeiture rules, as they do with Maryland Rule 10-901, because intimidation, which strikes at the heart of our justice system, is a tactic that many abusers employ. Moreover, victims of domestic violence endure multiple attacks from

the same abuser (on average, victims endure five to seven violent incidents) before they involve police. Andrew King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441, 461 (2006). Justice requires that the forfeiture doctrine apply to domestic violence cases because of the intimidation and fear that are inherent in domestic violence situations.

Even though Maryland Rule 10-901 is an inappropriate application in the case of an objection based on the Confrontation Clause just as much as Rule 804(b)(6) is, the Maryland statute at least offers guidance where the federal rule offers none. In this way, Maryland's rule can provide guidance and continuity to the still unresolved ambiguities of the commonlaw forfeiture doctrine. After all, the common law forfeiture doctrine remains the only legitimate way for a court to extinguish an accused's confrontation right based on the accused's wrongdoing.

The requirement of separate wrongdoings and the rejection of the reflexive approach are implied by the language, but, admittedly, they are not explicit. Nonetheless, evidentiary scholar Robert Mosteller declared that the Maryland approach "moves in the right direction." 19 REGENT U. L. REV. 2, 533 (2006).

Intent to Silence: Requirement and Standard

In a Maryland forfeiture hearing, there is no requirement of proof that the wrongdoing was intended to silence a witness. Rejecting the intent to silence requirement at a preliminary hearing strengthens the maxim that the forfeiture doctrine is not based on the defendant's intent but, instead, on his or her inability to profit from the wrongful act. Consequently, a defendant who participates in an intentional act "forfeits his right to confront that witness at trial, regardless of motive or whether the wrongdoer knew that the victim had or could testify against him." Alycia Sykora, Comment, *Forfeiture by Misconduct: Proposed Federal Rules of Evidence* 804(b)(6), 75 OR. L. REV. 855, 880 (1996).

It has been persuasively argued that, if the intent to silence requirement was not a required preliminary showing under Rule 804(b)(6), it "could be especially helpful in ongoing domestic abuse situations when the victim becomes 'unavailable' due to fear of continued beatings." Moreover, if Rule 804(b)(6) were to be rewritten without including motive, the rule could focus on the wrongdoing and its effects. In this way, "courts would focus on 'how' and 'whom' rather than 'why.'" *Id*.

In a letter to Judge Joseph F. Murphy, chair of the evidentiary committee considering the adoption of Maryland Rule 10-901, Professor Richard Friedman noted that, although Rule 804(b)(6) is a "useful model for a forfeiture rule … a better rule would be somewhat broader. The Federal Rule applies only if the wrongful conduct was intended to procure, and did procure, the unavailability of the declarant. But it should be enough if the wrongful conduct is the cause of the declarant's unavailability." Richard Friedman, Letter to Hon. Joseph F. Murphy Jr., Chair, The Court of Appeals of Maryland Standing Committee on Rules of Practice and Procedure (Nov. 30, 2004) (on file with author).

Not only does the statutory language in Maryland's rule offer a promising model for modification of Federal Rule 804(b)(6), but it is also in alignment with the recent ruling in *United States v. Garcia-Meza*. The *Garcia-Meza* court held that an "accused forfeits his constitutional right of confrontation any time his wrongdoing is responsible for the death or unavailability of a witness against him, even if his motive was not to eliminate that victim as a potential source of testimony against him. Wessenberger and Duane, *Federal Rules of Evidence: Rules, Legislative History, Commentary and Authority* 607 (5th ed. 2008) (citing *United States v. Garcia-Meza*, 403 at 364, 370–371).

The standard applied by Maryland Rule 10-901 is clear and convincing evidence. Even though both the Maryland rule and Federal Rule 804(b)(6) apply in only hearsay contexts, the use of both rules to determine constitutional questions no doubt warrants a higher standard of proof than the low hurdle of "more likely than not." In *United States v. Thevis*, 665 F.2d 616, 631 (5th Cir.) *cert. denied*, 459 U.S. 825 (1982)—the only federal court to apply a clear and convincing standard—the Supreme Court declared held that "[b]ecause confrontation rights are so integral to the accuracy of the fact-finding process and the search for truth," clear and convincing proof is necessary.

Professor Friedman's letter to Judge Murphy also influenced the standard applied at Maryland Rule 10-901 preliminary hearings. Professor Friedman advised Maryland that "[i]f there is concern that the forfeiture doctrine will be applied too broadly, that concern can be addressed by requiring an elevated standard of proof that the accused's wrongdoing rendered the witness unavailable; I believe such an elevated standard is probably a good idea in. …"

Though the standard is heightened in Maryland Rule 10-901, the clear and convincing standard is not a much higher hurdle than the preponderance of evidence standard is. In fact, "There is no clear line between the two burdens, and any judge who believes the evidence shows that wrongdoing has taken place can find that it was proven by clear and convincing evidence. It is unlikely than any appellate court will reverse because the judge made a finding by clear and convincing evidence when the appellate court believed that it was proven, by only by a preponderance of the evidence." Richard Friedman, Letter to Hon. Joseph F. Murphy Jr.

In addition to heightening the standard, Maryland's rule sets up another barrier that is not included in Rule 804(b)(6): a requirement that the Maryland Rules of Evidence be strictly applied during the preliminary hearing, a hearing used to determine if the rule should be applied. Federal Rule 804(b)(6) treats the forfeiture hearing no differently than it treats other preliminary matters and hence does not bind the judge to any rules of evidence, except privilege. FED. R. EVID. 104(a). Maryland's federal counterpart has no such requirement. Instead, the application of Rule 804(b)(6) is treated like all other preliminary matters are, and, according to Federal Rule of Evidence 104, the Federal Rules of Evidence are loosely applied. In this way, the Maryland approach eliminates the danger of "bootstrapping"—that is, the possibility that evidence can "lift itself by its own bootstraps to the level of competent evidence." *Glasser v.*

United States, 315 U.S. 60, 74–75 (1942).

Superficially, it may seem that the solutions offered by Maryland Rule 10-901 are useless because of their limited applicability—that is, the solutions are effective only in the rare instances when the high evidentiary hurdles are overcome. But a higher standard and strict application of the rules of evidence will, in most forfeiture cases, have no substantive effect. A strict application of evidence rules during a preliminary hearing requires only that the prosecutor find a legitimate way to offer evidence—namely, a hearsay exception. In forfeiture by wrongdoing cases, the party opponent exclusion and the present sense impression hearsay exception will often be helpful. The excited utterance exception to hearsay will no doubt be the most useful exception because of the high levels of stress that commonly accompany forfeiture situations.

Maryland set up protective barriers in its forfeiture rule as a way to guard the constitutional confrontation right. Maryland Rule 10-901 protects the sanctity of the confrontation right and restores reverence for English and Roman common law. Like the biblical judicial models, Maryland recognizes the need for an accuser before a judgment of guilt can be rendered. It is out of reverence for such a condition precedent that Maryland adopted a strict forfeiture rule.

Conclusion: Maryland as the Model

Forfeiture by wrongdoing is a doctrine that has power to extinguish the constitutional right to confront one's accuser. It is precisely because of the doctrine's significant power that ambiguous language and nonuniform application cannot be tolerated. In forfeiture by wrongdoing cases, "[p]recision is important … not only because of the constitutional rights issue, but also because lower courts will continue to need guidance. …"[22]

Rule 804(b)(6) is being used as persuasive precedent for confrontation objections and thus the language of Rule 804(b)6) needs to be precise so that its application will be uniform and limited. Maryland Rule 10-901 is clearly drafted and plainly identifies the hurdles that must be overcome before the forfeiture doctrine is applied. The hurdles in Maryland's rule are clearer and higher than those included in Rule 804(b)(6) and represent the reverence for the Constitution that must accompany a doctrine that has the power to extinguish a constitutional right.

When Maryland Rule 10-901 is applied strictly, more witnesses will be compelled to appear to testify in court. Therefore, the defendant's confrontation right will be protected and respected while justice is advanced by the testimony of live witnesses. Citing the reciprocal advantage of a more stringent forfeiture doctrine, Professor Robert Mosteller states:

> [A]t least one of the things about having a more vigorous Confrontation Clause is that more people might show up and in that way, defendants might lose more of the time, so it might be bad for defendants, but it's better for our system of justice. If we have something that is vibrant, if it creates the right kind of incentives, and if as a result people get into the courtroom, folks who are making the accusations say them to the face of the individual, the defendant gets to cross examine, and then the jury decides the case on the basis of best evidence.[23]

As it stands, hearsay exception Rule 804(b)(6) can strip a U.S. citizen of his or her constitutional right to confront an accuser. This application of a hearsay rule to a constitutional right is by definition unconstitutional and, even though it should not be tolerated anywhere, it cannot be tolerated in America. However, revising the language of Rule 804(b)(6) and modeling it after Maryland Rule 10-901 could remedy the error made by the courts and restore reverence for the Constitution. Doing so could, after all, be a matter of life and death. **TFL**

Jodi Lynn Foss is a third-year law student at Regent University where she is the symposium editor of the Law Review and chair of the Trial Advocacy Board.

Endnotes

[1]At least 10 state courts have adopted the forfeiture by wrongdoing hearsay exception: PENN. R. EVID. 804(b)(6); TENN. R. EVID. 804(b)(6); *Arizona v. Valencia*, 924 P.2d 497, 502 (Ariz. Ct. App. 1996); *Devonshire v. United States*, 691 A.2d 165, 168 (D.C. 1997); *Iowa v. Hallum*, 606 N.W. 2d 351, 354–356 (Iowa 2000); *Kansas v. Gettings*, 769 P.3d 25, 28 (Kan. 1989); *Louisiana v. Magouirk*, 539 So. 2d 50, 64–65 (La. Ct. App. 1988); *Minnesota v. Black*, 291 N.W. 2d 208, 214 (Minn. 1980); *New Jersey v. Sheppard*, 484 A. 2d 1330, 1341–1343 (N.J. Super. Ct. Law Div. 1984); and *Holtzman v. Hellenbrand*, 460 N.Y.S.2d 591, 595–598 (App. N.Y. Div. 1983).

[2]Courts must apply the common law doctrine of forfeiture by wrongdoing to Confrontation Clause issues. However, the common law doctrine also has ambiguities and, because Rule 804(b)(6) is a codification of the common law, courts may look to it for guidance.

[3]*See* Committee on Rules of Practice and Procedure, Minutes of the Meeting of June 19–20, 1996, www.uscourts.gov/rules/Minutes/st6-96.htm.

[4]For hearsay purposes, all the ambiguities in Rule 804(b)(6) may be tolerable. This section focuses on the dangers of the ambiguities as the terms are used to determine a defendant's forfeiture of his or her right to confrontation.

[5]But see *United States v. Mastrangelo*, 693 F.2d 269, 271 (2d Cir. 1982) (quoting Judge Weinstein's trial findings) (ruling that the common law forfeiture doctrine also recognizes acquiescence as a means to waiver the confrontation right).

[6]James F. Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation:A Reach Exceeding Its Grasp and Other Problems with Federal Rules of Evidence 804(b)(6))*, 51 DRAKE L. REV. 459, 477 (2003) (emphasis added) (citing Minutes of the Advisory Committee on Federal Rules of Evidence (May 4–5, 1995).

[7]Alycia Sykora, Comment, *Forfeiture by Misconduct: Proposed Federal Rules of Evidence 804(b)(6),* 75 OR. L. REV.

855, 860–861 (1996).

[8]The initial draft reads: "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (6) Waiver by misconduct. A statement offered against a party who has engaged of acquiesced in wrongdoing that was intended to, and did procure the unavailability of the witness." Flanagan, *supra* note 6 (citations omitted).

[9]Paul W. Grimm and Jerome E. Deise Jr., *Hearsay, Confrontation, and Forfeiture by Wrongdoing:* Crawford v. Washington*, a Reassessment of the Confrontation Clause*, 35 U. BALT. L.F. 5, 23 (2004) (quoting Commentary to the 1997 changes to the Federal Rules of Evidence) (emphasis added).

[10]*Id*. ("If a witness is absent by [the accused's] own wrongful procurement, [the accused] cannot complain if competent evidence is admitted to supply the place of that which is kept away.") Richard Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 506 (1997) (proposing that the forfeiture rule is based on the premise that one cannot complain about a self-created situation. Friedman relies on the illustration of "chutzpa," which includes a boy who kills both his parents and then begs for mercy before the court as an orphan).

[11]Flanagan, *supra* note 6 (emphasis added) (citing Minutes of the Advisory Committee on Federal Rules of Evidence (May 4–5, 1995).

[12]Grimm and Deise, *supra* note 9 at 25.

[13]This term is borrowed from Professor Richard Friedman and is used to describe the situation where the "act that rendered the declarant-victim unable to testify [is] the same criminal act for which the accused is now on trial." Friedman, *supra* note 10 at 508.

[14]*See State v. Jarzbek*, 539 A.2d 1245, 1253 (Conn. 1987) (rejecting the reflexive approach and ruling that threats "made during the commission of the very crimes of which [the defendant was] charged" were not acceptable as a basis for forfeiture of the right to confrontation); *Mastrangelo* at 272–273 (accepting the reflexive approach because any other result would "mock very system of justice the confrontation clause was designed to protect.") (citations omitted).

[15]Such a clarification would only be for guidance in applying the common law forfeiture doctrine because, of course, the hearsay rules of evidence are not binding on constitutional analysis. Nevertheless, considering the courts' strong reliance on Rule 804(b)(6) for a finding of confrontation forfeiture, a clarification in the rule would benefit the application of the common law by making it more predictable and make even the common law application more constitutional.

[16]Both hypotheticals involve a drug trial, but there is nothing inherently important about the choice of drug charges, except for the fact that drug charges are criminal. Any other criminal conduct would leave the purpose of the hypothetical untouched. Also, for purposes of the hypotheticals, it is assumed that all of the other requirements of Rule 804(b)(6) have been satisfied.

[17]*See*, for example, *United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992); *United States v. Potamitis*, 739 F.2d 784, 789 (2d Cir.), *cert. denied*, 469 U.S. 918 (1984); *Steele v. Taylor*, 684 F.2d 1193, 1199 (6th Cir. 1982), *cert. denied*, 460 U.S. 1053 (1983); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980); *United States v. Carlson*, 547 F.2d 1346, 1358–1359 (8th Cir.), *cert. denied*, 431 U.S. 914 (1977).

[18]To read the thoughts of Maryland's approach from evidentiary scholars Professor Richard Friedman, Professor Christopher Mueller, Professor Penny White, Professor James Duane, and Professor Robert Mosteller, see 19 REGENT UNIV. L. REV. 507, 530–533 (2006–2007).

[19]This requirement that a defendant should be punished for his or her actions (as opposed to inaction under acquiescence) is the basis for the forfeiture doctrine rationales.

[20]To be precise, Maryland Rule 10-901 should change the articles "the" to "a" to better reflect that the statute applies even in instances when the defendant's wrongful acts procured the unavailability of a witness, even though the defendant did not act to cause the unavailability of a specific witness.

[21]For example, if the "wrong" that brought the defendant into court was murder, the prosecution would know at the exact time that the charges of the murder were brought that the declarant was unavailable, assuming that the prosecution wanted to offer the victim's statements. Similarly, if the defendant was charged with rape, the prosecution would know that the "wrong" of the rape was going to make the declarant unavailable at the same time that the prosecution became aware of the rape.

[22]Sykora, *supra* note 7 at 875.

[23]Robert Mosteller, *Crawford, Davis & the Right of Confrontation: Where Do We Go From Here?*, Afternoon, Panel Discussion, 19 REGENT UNIV. L. REV. 507, 533 (2006).