



FEDERAL EVIDENCE REVIEW

HIGHLIGHTING RECENT FEDERAL EVIDENCE CASES & DEVELOPMENTS

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Lead Story: Proposed Legislative Amendments To FRE 804(b)(6) (Forfeiture By Wrongdoing)

*F*RE 804(b)(6) allows statements to be admitted as an exception to the rule excluding hearsay where a party procures the unavailability of the declarant as a witness. The terms of the rule explicitly allow a hearsay statement to be offered against a party that has “engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability” of the hearsay declarant as a witness. FRE 804(b)(6). The most challenging aspect in introducing statements under the rule is demonstrating a sufficient nexus to show the defendant’s role in the wrongdoing resulted in the unavailability of the witness.



Five bills have been introduced in Congress to amend the rule, as part of anti-gang violence legislation. One of those measures (S. 456 – Feinstein) was the subject of a June 5th hearing before the full Senate Judiciary Committee. The bills seek to clarify the reach of FRE 804(b)(6) to members of conspiracies, particularly gangs. This *Lead Story* examines the proposed amendments to FRE 804(b)(6) and their possible impact on the doctrine of forfeiture by wrongdoing as currently employed in the federal courts.

Forfeiture By Wrongdoing In The Federal Courts

There are three foundational elements for introducing hearsay evidence under FRE 804(b)(6) on the theory that the defendant forfeited the right to object to the statement under a preponderance of the evidence standard:

- (1) The defendant engaged or acquiesced in wrongdoing,
- (2) The wrongdoing was intended to procure the declarant’s unavailability, and
- (3) The wrongdoing did procure the unavailability.

See *United States v. Scott*, 284 F.3d 758, 762 (7th Cir.

2002) (“To admit a statement against a defendant under the rule ... the government must show (1) that the defendant engaged or acquiesced in wrongdoing, (2) that the wrongdoing was intended to procure the declarant’s unavailability, and (3) that the wrongdoing did procure the unavailability.”); see also *United States v. Gray*, 405 F.3d 227, 243-44 (4th Cir. 2005) (“[S]tatements were admissible [under FRE 804(b)(6)] only if

the district court properly found, by a preponderance of the evidence, that (1) Gray engaged in some wrongdoing (2) that was intended to procure [declarant] Robert Gray’s unavailability as a witness and (3) that did, in fact, procure his unavailability as a witness.”); *United States v. Houlihan*, 92 F.3d 1271, 1280 (1st Cir. 1996) (“We therefore hold that when a person who eventually emerges as a defendant (1) causes a potential witness’s unavailability (2) by a wrongful act (3) undertaken with the intention of preventing the potential witness from testifying at a future trial, then the defendant waives his right to object on confrontation grounds to the admission of the unavailable declarant’s out-of-court statements at trial.”) (pre-FRE case); but see *United States v. Stewart*, 485 F.3d 666, 670-71 (2d Cir. 2007) (“[T]he district court may admit hearsay evidence as to statements by an unavailable declarant if it finds by a preponderance of the evidence ...that (a) the ‘party against whom the out-of-court statement is offered[] was involved in, or responsible for, procuring the unavailability of the declarant through knowledge, complicity, planning or in any other way,’ and (b) that party ‘acted with the intent of procuring the declarant’s unavailability as an actual or potential witness’”) (quoting *United States v. Dhinsa*, 243 F.3d 635, 653-54 (2d Cir.) (“‘It is hard to imagine a form of misconduct more extreme than the murder of a potential witness.... We have no hesitation in finding, in league with all circuits to have considered the matter, that a defendant who wrongfully procures the absence of a witness or potential witness may not assert confrontation rights as to that witness.’”), cert. denied, 534 U.S. 897 (2001) (citation omitted).



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